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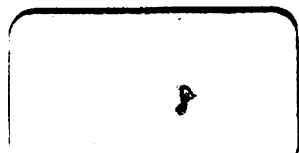
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SUPPLEMENT
TO
BLOOM'S
MECHANICS' LIENS
AND
BUILDING CONTRACTS

WITH AN
APPENDIX
CONTAINING THE CALIFORNIA MECHANICS' LIEN LAW AS
AMENDED IN 1911

FULLY ANNOTATED
BY CROSS-REFERENCES

BY
S. BLOOM
OF THE SAN FRANCISCO BAR

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PART I.

SUBSTANTIVE LAW, OR PRIMARY RIGHTS.

CHAPTER I.

HISTORY, SPIRIT, NATURE, AND CONSTRUCTION OF THE LAW.

§ 1. Introductory. Owing to the large number of cases decided during the past two years in the various courts, the change of attitude assumed by some of them towards the statute, the complete revision of the statute in at least one of the states considered in the Treatise, and for other reasons, it has been deemed expedient to issue this Supplement.

§ 2. General divisions of subject. California Statute distinguished.

Additional matter to foot-note 4.¹

§ 3. Questions raised by the decisions.

Additional matter to subdivision 3.²

§ 4. Historical.

Additional matter to foot-note 5.³

¹ **California.** While the general division of subjects given in the text of the Treatise is applicable to the new Act of May, 1911 (Stats. & Amdts., 1911, pp. 1313 et seq.), the new statute is much clearer in its division of the subjects or work for which a lien is given.

² **California.** The new Act of May 1, 1911 (Stats. & Amdts., 1911, pp. 1313 et seq.) attempts a statutory statement regarding the nature of the lien. See Supplement, § 10, post.

³ **Unknown to common law:**

Oklahoma. Christy v. Union O. & G. Co. (Okla. March 21, 1911), 114 Pac. Rep. 740; Shirley v. Union O. & G. Co. (Okla., March 21, 1911), 114 Pac. Rep. 742; Keel v. Ingersoll (Okla., September 13, 1910), 111 Pac. Rep. 214.

Or equity jurisprudence: California. Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520, 97 Pac. Rep. 414, 420.

Bloom's Sup.—1

Additional matter to foot-note 7.⁴

§ 4a. **Constitutional Liens.** While in nearly all of the states mechanics' liens are created by act of the legislature, in a few jurisdictions some of these liens are more properly the creations of the state constitutions, as in Texas and California; and it is only in a broad sense that apart from the statute providing for the enforcement of the same, such constitutional mandatory liens may be denominated statutory liens. Furthermore, in California, for instance, as already shown,⁵ the statute provides for liens more extensive in character than the constitution grants.⁶

The more recent decisions of the California Supreme Court, it is said, recognize the force of the constitutional declaration of the right to such liens.⁷

Texas. See *Pratt v. Tudor*, 14 Texas 39; *Shields v. Morrow*, 51 Texas 393.

⁴ **Creature of local legislation:**

California. *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. Rep. 78 (hearing by Supreme Court denied); *Holt Mfg. Co. v. Collins*, 154 Cal. 264, 271, 97 Pac. Rep. 516; *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 475.

Arkansas. See *Murray v. Rapley*, 30 Ark. 568.

Kansas. *Potter v. Conley* (Kan., January 7, 1911), 112 Pac. Rep. 608, 609.

Minnesota. See *Toledo N. Works v. Bernheimer*, 8 Minn. 118 (Gil. 92).

Nevada. *Tonopah L. Co. v. Nevada A. Co.*, 30 Nev. 445, 97 Pac. Rep. 636, 639; *Porteous D. Co. v. Fee*, 29 Nev. 380, 91 Pac. Rep. 135.

New Mexico. *Burton-Lingo Co. v. Patton* (N. M., February 28, 1910), 107 Pac. Rep. 679, 680.

Oklahoma. *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 108 Pac. Rep. 409, 411; *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547; *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214; *Christy v. Union O. & G. Co.* (Okl., March 21, 1911), 114 Pac. Rep. 740; *Shirley v. Union O. & G. Co.* (Okl., March 21, 1911), 114 Pac. Rep. 742.

Oregon. *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, 898.

Utah. *Park City M. Co. v. Comstock S. M. Co.* (Utah, June 12, 1909), 103 Pac. Rep. 254, 257.

Washington. *Crane Co. v. Aus H. Co.* (Wash., December 20, 1910), 112 Pac. Rep. 430, 432; *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766.

⁵ *Treatise*, § 28, ante.

⁶ See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216 (hearing by Supreme Court denied); s. c., 8 Cal. App. 512, 97 Pac. Rep. 218. See also *Spinney v. Griffith*, 98 Cal. 149, 32 Pac. Rep. 974.

⁷ *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216 (hearing by Supreme Court denied); s. c., 8 Cal. App. 512, 97 Pac.

§ 5. Evolution of California mechanics' lien law.

Additional matter to foot-note 11.⁸

§ 6. Spirit of the law.

Additional matter to Oregon foot-note 14.⁹

§ 7. Theory of the mechanics' lien law. It has been said in a recent case that the underlying principle of the entire theory of the mechanics' lien law is estoppel.¹⁰

Additional matter to foot-note 15.¹¹

Additional matter to foot-note 16.¹²

Rep. 218; citing *Hampton v. Christensen*, 148 Cal. 729, 737, 84 Pac. Rep. 200; *Hughes Bros. v. Hoover*, 3 Cal. App. 145, 150, 84 Pac. Rep. 681.

⁸ **Utah.** Evolution of statute. The mechanics' lien law of Utah, in substantially its present form, was adopted in 1894 (laws 1894, p. 44, c. 41). The lien act consisted of 16 sections and contained the whole law upon the subject of mechanics' liens. In 1898, when the laws of the state were revised, and, to some extent, recast, this act was made Chapter I, tit. 39, of the Revised Statutes of 1898. The phraseology of the law was changed somewhat, and the different sections as originally numbered were, in many respects, changed, so that Chapter I aforesaid is composed of 28, instead of 16 sections. Chapter I is composed of §§ 1372 to 1399 inclusive in the Revised Statutes of 1898, and these sections retain the same numbering in the Compiled Laws of 1907. The original act provided for liens for labor and material upon almost every kind of improvement; but, in doing so, neither the matters for which liens were created nor the property upon which liens were given were mentioned in the same section. From the wording of the different sections it is, however, made apparent that sometimes some of the provisions of the particular section were intended to apply to the matters set forth in that section only, while it is equally apparent that other provisions of the same section were intended to apply to the act as a whole: *Park City M. Co. v. Comstock S. M. Co.* (Utah, June 12, 1909), 103 Pac. Rep. 254, 258.

⁹ **Oregon.** Statutory privilege: *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079, s. c., 52 Oreg. 545, 97 Pac. Rep. 1081, s. c. 52 Oreg. 546, 97 Pac. Rep. 1082.

¹⁰ **California.** *John R. Gentle & Co. v. Britton*, 158 Cal. 328, 333, 111 Pac. Rep. 9 (on hearing in the Supreme Court); s. c., 8 Cal. App. Dec. 350.

¹¹ **California.** See *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 486, 94 Pac. Rep. 73. But see, criticising this case generally, *Robison v. Mitchell* (Cal. Sup., March 20, 1911), 114 Pac. Rep. 984, 988.

Nevada. *Porteous Dec. Co. v. Fee*, 29 Nev. 380, 91 Pac. Rep. 135; *Tonopah L. Co. v. Nevada A. Co.*, 30 Nev. 445, 97 Pac. Rep. 636, 639.

¹² **California.** *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 461, 94 Pac. Rep. 775.

Idaho. *Naylor & Nowlin v. Lewiston & S. E. Ry. Co.*, 14 Idaho 722, 95 Pac. Rep. 827, 829; s. c. 96 Pac. Rep. 573; *Steltz v. Armory Co.*, 15 Idaho 551, 99 Pac. Rep. 98, 101 (as to Sess. Laws 1899, p. 148).

Additional matter to foot-note 17.¹³

Additional matter to foot-note 18.¹⁴

Additional matter to foot-note 19.¹⁵

§ 8. A favored lien. While the mechanics' lien is favored in the law, yet it is for the legislature to determine the method by which the lien can be enforced; and the courts are not at liberty to disregard any statutory requirement.¹⁶

Additional matter to foot-note 23.¹⁷

Kansas. See *Robert Garrett L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 180.

Montana. See *Smallhouse v. Kentucky M. G. & S. M. Co.*, 2 Mont. 443, 445.

Oklahoma. The mechanics' lien law was enacted for the protection of those furnishing material for and performing labor on the building and not for the benefit of him who has the building constructed: *Crutcher v. Block*, 19 Okl. 246, 91 Pac. Rep. 897.

Oregon. See *Escott v. Crescent C. & N. Co.* (Oreg., January 25, 1910), 106 Pac. Rep. 452, 454; *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, 897.

California. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 464, 94 Pac. Rep. 775.

Montana. See *Smallhouse v. Kentucky M. G. & S. M. Co.*, 2 Mont. 443, 445.

Oregon. See *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, 897.

New Mexico. *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 605.

California. Principle underlying *Dore v. Sellers*. The principle upon which the decision in the case of *Dore v. Sellers*, 27 Cal. 538, was decided, under the Act of 1862, has no application to the law as it existed in California before the Act of May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.), and was based upon a different theory, namely, that the lien was not granted because the owner's property was benefited, but because claimant furnished labor or materials for the contractor, to whom the law granted a lien; and that there was no lien in the subclaimants independently of the contractor, and that they obtained their liens not as principals, though entitled to be first paid out of the moneys becoming due under the contract (upon the principle of subrogation): *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

Idaho. See *Steltz v. Armory Co.*, 15 Idaho 551, 99 Pac. Rep. 98, 100.

Kansas. See *Robert Garrett L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 180.

New Mexico. *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 605.

California. *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 486, 94 Pac. Rep. 773. See criticising this case generally, *Robison v. Mitchell* (Cal. Sup., March 20, 1911), 114 Pac. Rep. 984, 988.

California. No lien for peeling bark under §3052 Civ. Code: *Quish v. Hill*, 154 Cal. 748, 99 Pac. Rep. 204.

§ 9. General nature of lien.Additional matter to foot-note 24.¹⁸**§ 10. General classification of liens of this character.**Additional matter to foot-note 25.¹⁹**§ 11. Another classification.**Additional matter to foot-note 26.²⁰**§ 12. The classification adopted herein.²¹**

§ 13. The same. Contractual relation between owner and original contractor. The new statute of California ²² expressly states that a direct lien is given to subclaimants; but there are expressions in the same section which render it more than doubtful whether the new law does not partake of the dual nature of the statute which it superseded. In other

Washington. Difficulty of compliance with statute. The argument that it is difficult to comply with the statute should be addressed to the legislature; the courts are not responsible for the wisdom or expediency of the lien law: *Finlay v. Tagholm* (Wash., March 8, 1911), 113 Pac. Rep. 1083, 1084, s. c., 111 Pac. Rep. 782.

¹⁸ **Oklahoma.** Materialman's lien under the statute is neither a *jus in re* nor a *jus ad rem*, but simply a right to charge property affected by it with the payment of the particular debt in preference and priority to other debts, on compliance with the requisites of the statute; and it is inchoate until perfected by the rendition of a judgment in rem in the mode pointed out by the statute: *Alberti v. Moore*, 20 Okl. 78, 98 Pac. Rep. 543, 547; *Porter & Co. v. Miles*, 67 Ala. 130.

¹⁹ **Idaho.** Direct lien. In this state, inferentially a direct lien is given. Compare *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

Kansas. Direct lien. In a majority of the states, as in *Massachusetts*, the subcontractor is given a direct lien, as in *Kansas*; and the *Kentucky* statute, as well as that of *Kansas*, provides that he shall have a direct lien and not by way of subrogation: *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 838, 839. See *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

Kentucky. See *Kansas* note, ante.

New Mexico. A direct lien is given to the subcontractor under Comp. L. 1897, §§ 2216 et seq.: *Baldrige v. Morgan* (N. M., January 6, 1910), 106 Pac. Rep. 342, 343; *Nash v. Morgan* (N. M., January 6, 1910), 106 Pac. Rep. 344; *Metz v. Romero* (N. M., January 6, 1910), 106 Pac. Rep. 344. See *Hobbs v. Spiegelberg*, 3 N. M. (Gild.), 357, 5 Pac. Rep. 529.

²⁰ See Supplement, § 10, additional matter to foot-note 25 of Treatise, ante.

²¹ As to Direct and Indirect Lien: See this Supplement, § 10 ante.

²² Act of May 1, 1911 (Stats. and Amdts. 1911, p. 1313).

words, it provides under certain conditions for a direct lien, and under others, for an indirect lien. The former statute, under certain circumstances, namely, the failure to file the statutory original contract as required by the law, gave a direct lien; otherwise, an indirect lien. On the other hand, the new statute in so many words purports to give a direct lien; but apparently, upon the filing by the owner of the original contract and the statutory bond in the manner provided, only an indirect lien is given.²³

The status of the lien upon the fund, under the garnishment proceeding by notice to the owner, still survives in the new act; and it remains to be seen what relation this lien will be found to bear to the others upon the property.²⁴

§ 14. Same. Valid and void contract. Effect. In the last preceding section some suggestions have been made as to the nature of the lien provided for by the new statute of California,²⁵ and the effect of the void contract under the prior law, so far as relates to the extent of the lien with reference to the contractual liability of the owner, has been compared with the new enactment.

Additional matter to foot-note 31.²⁶

§ 15. Same. The object or thing to which the lien attaches. There can be no mechanics' lien on vacant land for the construction of a building which is destroyed by fire, earthquake, flood or other natural cause, without fault of the owner.²⁷

Additional matter to foot-note 32.²⁸

²³ See new statute annotated in Appendix, post.

²⁴ See Notice to owner, Treatise, §§ 547 et seq., ante, and notes to same sections this Supplement, post.

²⁵ Stats. and Amdts. 1911, pp. 1313 et seq.

²⁶ See Direct Lien, notes to § 10, foot-note 25 ante, this Supplement.

²⁷ *California*. See *Watson v. Alta I. Co.*, 12 Cal. App. 560, 564, 108 Pac. Rep. 48 (hearing in Supreme Court denied); *Watson v. Alta I. Co.*, 12 Cal. App. 566, 108 Pac. Rep. 50 (hearing in Supreme Court denied); *Seebach v. Kuhn*, 9 Cal. App. 485, 489, 99 Pac. Rep. 723 (hearing in Supreme Court denied). See, also, *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237, 107 Pac. Rep. 150.

²⁸ *Arkansas*. See *Keel v. Ingersoll* (Okla., September 13, 1910), 111 Pac. Rep. 214.

§ 16. **Same. Lien on structure separate from land.** The rule is not uniform in all of the states as to whether a mechanic's lien may attach to the building separate and apart from the land upon which it is located. In some states the rule prevails that, where for any reason the lien can not attach to the land, it may attach to the building separate and apart therefrom.

In other states the lien attaches only to the building, but it appears that in a majority of the states a lien upon the building separate and apart from the land is not recognized. The rule in each state is determined by specific provisions of its statute, or the construction of such statute by the courts of that state. In those states where it is held that the lien may attach to the building separate from the land, although the statute does not specifically so direct, the rule has resulted from construction of provisions in statutes of such state authorizing a sale of the building or improvement separate and apart from the land and a removal of the same from the land by the purchaser.²⁹

Colorado. Building as fixture. See *Hughes v. Kershow*, 42 Colo. 210, 93 Pac. Rep. 1116.

Indian Territory. See *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214.

Nebraska. Compare *Western C. M. Co. v. Leavenworth*, 52 Neb. 418, 72 N. W. Rep. 592.

New Mexico. See *Burton-Lingo Co. v. Patton* (N. M., February 28, 1910), 107 Pac. Rep. 679, 682, 683.

Oklahoma. See *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214.

Utah. *Park City M. Co. v. Comstock S. M. Co.* (Utah, June 19, 1909), 103 Pac. Rep. 254, 259.

²⁹ **Oklahoma.** *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214.

The Oklahoma statute contains no provision creating in terms a lien upon the improvements separate and apart from the realty; nor does it contain any provision authorizing a foreclosure of the lien upon such improvements separate and apart from the land when for any reason the lien can not attach to the land, or that authorizes the vendee to remove such improvements after purchase. This statute, put in force in the Indian Territory by an act of Congress (Act May 2, 1890, c. 182, § 31, 26 Stat. 81) was adopted from the state of Arkansas, where it had received construction by the highest appellate court of that state before its adoption (*Cotton v. Penzel*, 44 Ark. 484; *Galbreath, Stewart & Co. v. Davidson*, 25 Ark. 490, 99 Am. Dec. 233; *McCullough v. Caldwell*, 5 Ark. 237; in which cases it is held that it was the design that the lien should attach to real property and not to merely personal property).

Additional matter to foot-note 35.³⁰

Additional matter to foot-note 38.³¹

§ 17. Same. Lien on the fund.³²

§ 18. The kinship between statutes of the various states.

Where a construction is given to a statute by the highest court of a state, and such statute is adopted by another state, the courts of the latter will presume that the legislature intended such construction to be placed upon the statute, and it will be followed by the courts in applying the statute, and such construction is adopted with the statute and forms a part of it,³³ unless it appears that the decision of the foreign court is based on unsound reasoning, or the application of the decision would lead to the denial of a substantial right.³⁴

Additional matter to foot-note 41.³⁵

The decisions in the following cases are based upon such statutory provisions, referred to in the text.

Michigan. *Jossman v. Rice*, 121 Mich. 270, 80 N. W. Rep. 25, 80 Am. St. Rep. 493.

Montana. *Grand Opera House v. Maguire*, 14 Mont. 558, 37 Pac. Rep. 607.

North Dakota. *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. Rep. 64.

Nebraska. Compare *Western C. M. Co. v. Leavenworth*, 52 Neb. 418, 72 N. W. Rep. 592.

Utah. *Park City M. Co. v. Comstock S. M. Co.* (Utah, June 19, 1909), 103 Pac. Rep. 254, 259.

California. See *John R. Gentle & Co. v. Britton*, 158 Cal. 328, 332, 111 Pac. Rep. 9 (on hearing in the Supreme Court), s. c., Court of Appeals, 8 Cal. App. Dec. 350.

³² See §§ 550 et seq., post, and notes.

³³ **Montana.** *McQueeney v. Toomey*, 36 Mont. 282, 92 Pac. Rep. 561, 122 Am. St. Rep. 358; *State Sav. Bank v. Albertson*, 39 Mont. 414, 102 Pac. Rep. 692; *Deer Lodge County v. United States F. & G. Co.* (Mont., Dec. 6, 1910), 112 Pac. Rep. 1060, 1064.

Oklahoma. *Jarrell v. Block*, 19 Okl. 467, 92 Pac. Rep. 167, 168.

³⁴ **Montana.** *Deer Lodge County v. United States F. & G. Co.* (Mont., Dec. 6, 1910), 112 Pac. Rep. 1060, 1064; *State v. Mott*, 29 Mont. 292, 74 Pac. Rep. 728.

³⁵ **Alaska.** The Montana and Iowa statutes are practically the same as the Alaska statute: *Copper River L. Co. v. Clark*, 3 Alaska 635, 639.

§§ 262-265, *Carter's Alaska Code*, although said to have been taken from the law of California of 1868, omits the specific provision of the California statute which gave a lien for the ordinary work of a miner in a mine; and it differs from the lien statutes of Oregon, California, Nevada and Colorado in that it limits the lien of a miner

§ 19. General peculiarities of mechanics' liens.

Additional matter to foot-note 42.³⁶

to the work done in the development or improvement of a mine:
Pioneer M. Co. v. Delamotte (C. C. A.), 185 Fed. Rep. 752.

Arkansas. See *Oklahoma*, this note, post.

California. See *Alaska*, this note, ante.

Colorado. See *Alaska*, this note, ante.

Indian Territory. See *Oklahoma*, this note, post.

Iowa. See *Alaska*, this note, ante.

Kansas. See *Oklahoma*, this note, post.

Montana. See *Alaska*, this note, ante.

Nevada. See *Alaska*, this note, ante.

New Mexico. The case of *Birmingham I. Foundry v. Gluecon S. Mfg. Co.*, 78 N. Y. 30, is under a statute more restrictive in its terms than the New Mexico statute, which is general and does not restrict the lien only to cases where materials are sold and delivered in New Mexico: *Stearns-Roger Mfg. Co. v. Astec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 709.

New York. See *New Mexico*, this note, ante.

Oklahoma. § 3869 Ind. T. Ann. St. was adopted from § 4402 Mansf. Dig. Stat. of Arkansas: *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214, 215. But the mechanics' lien law of Oklahoma (Code Civ. Proc., §§ 619 et seq.; Wilson's Rev. & Ann. St. 1903, §§ 4817 et seq.), was taken from the mechanics' lien law of Kansas: *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214, 215; *Bloch v. Pearson*, 19 Okl., 422, 91 Pac. Rep. 714.

Oregon. See *Alaska*, this note, ante.

³⁶ *Mechanics' lien creature of statute:*

Arkansas. *Murray v. Rapley*, 30 Ark. 568.

California. *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 271, 97 Pac. Rep. 516; *D. I. Nofsinger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 475; *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. Rep. 78 (hearing denied by Supreme Court); *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216 (hearing by Supreme Court denied), s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Kansas. *Potter v. Conley* (Kan., January 7, 1911), 112 Pac. Rep. 608, 609.

Minnesota. *Toledo N. Works v. Bernheimer*, 8 Minn. 118 (Gil. 92).

Mississippi. See *Eller's Admr. v. Elder*, 51 Miss. 495.

Nevada. *Porteous Dec. Co. v. Fee*, 29 Nev. 380, 91 Pac. Rep. 135; *Tonopah L. Co. v. Nevada A. Co.*, 30 Nev. 445, 97 Pac. Rep. 636, 639.

New Mexico. *Burton-Lingo Co. v. Patton* (N. M., February 28, 1910), 107 Pac. Rep. 679, 680.

Oklahoma. *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547; *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214; *Christy v. Union O. & G. Co.* (Okl., March 21, 1911), 114 Pac. Rep. 740; *Shirley v. Union O. & G. Co.* (Okl., March 21, 1911), 114 Pac. Rep. 742; *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 103 Pac. Rep. 409, 411.

Oregon. *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, 898.

Texas. *Pratt v. Tudor*, 14 Tex. 39; *Shields v. Morrow*, 51 Tex. 393.

Utah. *Park City M. Co. v. Comstock S. M. Co.* (Utah, June 12, 1909), 103 Pac. Rep. 254, 257.

Additional matter to foot-note 43.³⁷

Additional matter to foot-note 44.³⁸

Additional matter to foot-note 45.³⁹

Additional matter to foot-note 47.⁴⁰

§ 20. Relation of lien to the debt. The debt created by furnishing materials or labor and the lien given therefor by the statute are two distinct matters; the former may be enforced as any other debt, while the lien exists only by the statute and must be enforced by such special proceeding as may be provided for that purpose.⁴¹

Additional matter to foot-note 50.⁴²

§ 21. Mechanic's lien and mortgage compared.

Additional matter to foot-note 53.⁴³

Washington. Tsutakawa v. Kumamoto, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766; Crane Co. v. Erie H. Co. (Wash., December 20, 1910), 112 Pac. Rep. 430, 432.

Wisconsin. See Bertheolot v. Parker, 43 Wis. 551.

37 Statute measure of right and mode of securing right:

Minnesota. Toledo N. Works v. Bernheimer, 8 Minn. 118, (Gil. 92).

Oklahoma. Christy v. Union O. & G. Co. (Okl., March 21, 1911), 114 Pac. Rep. 740; Shirley v. Union O. & G. Co. (Okl., March 21, 1911), 114 Pac. Rep. 742.

Washington. See Finley v. Tagholm (Wash., March 8, 1911), 113 Pac. Rep. 1083, s. c., 111 Pac. Rep. 782.

38 Statute rule of mode of enforcement:

California. Baker v. Lake L. C. & I. Co., 7 Cal. App. 482, 486, 94 Pac. Rep. 778; McNiel v. Borland, 23 Cal. 149; Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520, 97 Pac. Rep. 414, 420.

39 Compliance with terms of statute:

Kansas. Those claiming a lien must bring themselves clearly within the provisions of the law: Potter v. Conley (Kan., January 27, 1911), 112 Pac. Rep. 608, 609.

40 Inchoate lien:

Alabama. Porter & Co. v. Miles, 67 Ala. 130.

California. See Goldtree v. City of San Diego, 8 Cal. App. 505, 512, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Nevada. Porteous Dec. Co. v. Fee, 29 Nev. 375, 91 Pac. Rep. 135, 136.

Oklahoma. Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 547.

41 California. Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520, 97 Pac. Rep. 414, 420.

42 California. See Goldtree v. City of San Diego, 8 Cal. App. 505, 512, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

43 Idaho. See Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Additional matter to foot-note 55.⁴⁴

§ 22. Nature of action to foreclose lien.

Additional matter to foot-note 57.⁴⁵

Additional matter to foot-note 58.⁴⁶

44 Idaho. Mechanic's lien and mortgage. There is a very material difference between a mortgage lien and a mechanic's lien. The first is given by contract, and in many instances the debt secured may be practically as much as the value of the property, and in most all instances considerable time elapses before the maturing of the debt, in which case there is ample opportunity for property to depreciate in value. On the other hand, the mechanic's or laborer's lien is involuntary on the part of the property owner, and arises by operation of law as an incident to the original contract. In every instance of a lien, however, the debt and obligation for which the lien is given is only so much as has been incurred by the creation or improvement of the property itself and the whole sum has gone to enhance the value of the property on which the lien is claimed. The time allowed for preferring the lien claim is so short that there is but little opportunity for the property to so depreciate in value that it will not sell on the market for an amount equal to the claim for labor or material or both that has been furnished: *Naylor & Nowlin v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho, 722, 95 Pac. Rep. 827, 829, s. c. 96 Pac. Rep. 573. The foregoing was said with reference to stay bonds, and does not appear to touch upon all the essential differences between mortgages and mechanics' liens.

45 Action to foreclose equitable:

Alaska. *Pioneer M. Co. v. Delamotte* (C. C. A.), 185 Fed. Rep. 752, 756.

Arkansas. See Oklahoma, this note, post.

California. *Stockton L. Co. v. Schuler*, 7 Cal. App. 257, 94 Pac. Rep. 399; *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 520, 97 Pac. Rep. 414, 420.

Illinois. *Tracy v. Rogers*, 69 Ill. 662.

Indian Territory. See Oklahoma, this note, post.

Oklahoma. The lien may be enforced either in equity, or, according to the statute, in a suit at law, in Indian Territory: *Jones v. Balsley* (Okl., September 13, 1910), 111 Pac. Rep. 942, s. c. 25 Okl. 344, 106 Pac. Rep. 830; *Murray v. Rapley*, 30 Ark. 569; *Kizer L. Co. v. Mosely*, 56 Ark. 544, 20 S. W. Rep. 409.

Washington. *Pacific L. & T. Co. v. Dalley* (Wash., November 23, 1910), 111 Pac. Rep. 869, 870.

46 Action in rem:

California. See *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. Rep. 640, 650.

Federal. *Heldritter v. Oil C. Co.*, 112 U. S. 294, 301, 5 Sup. Ct. Rep. 135, 138, 28 L. ed. 729.

Idaho. The charge is purely in rem: *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. Rep. 24, 27.

Montana. See *Gassert v. Strong*, 38 Mont. 18, 98 Pac. Rep. 497, 500 (mortgage, quasi in rem).

Oklahoma. *Jones v. Balsley*, 111 Pac. Rep. 942, s. c. 25 Okl. 344, 106 Pac. Rep. 830.

Additional matter to foot-note 60.⁴⁷

§ 23. Nature and scope of right conferred.

Additional matter to foot-note 61.⁴⁸

§ 24. Construction of mechanics' lien statutes.

Additional matter to foot-note 62.⁴⁹

§ 25. Same. Confusion in the authorities. The law of interpretation relating to mechanics' lien statutes in California, it is said, has recently been in a state of transition.⁵⁰ The courts declare, however, that they are not required to give a strained construction to the statute to enable persons to collect their debts from parties who never agreed to pay them and who never requested the performance of the work or delivery of the materials.⁵¹

⁴⁷ Garnishment proceeding on fund equitable:

California. Goldtree v. City of San Diego, 8 Cal. App. 505, 510, 97 Pac. Rep. 216 (hearing denied by Supreme Court), s. c. 8 Cal. App. 512, 97 Pac. Rep. 218.

⁴⁸ **California.** As to assignment of right conferred by notice, see Goldtree v. City of San Diego, 8 Cal. App. 505, 512, 97 Pac. Rep. 216 (hearing by Supreme Court denied), s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Assignment of claim of lien on harvester under act of March 21, 1905, Stats. 1905, p. 618 (now § 3061 Civ. Code); see Lemon v. Hubbard, 10 Cal. App. 471, 102 Pac. Rep. 554.

Arizona. See Harper v. Independence D. Co. (Ariz., April 2, 1910), 108 Pac. Rep. 701, 703.

Oregon. Right to perfect logging lien under B. & C. Comp., §§ 5677-5679, held personal, and can not be assigned: Alderson v. Lee, 52 Oreg. 92, 96 Pac. Rep. 234, 237.

⁴⁹ **Construction of statute of sister state by adoption of such statute:**

Montana. Deer Lodge County v. United States F. & G. Co. (Mont., December 6, 1910), 112 Pac. Rep. 1060, 1064; McQueeney v. Toomey, 36 Mont. 282, 92 Pac. Rep. 561, 122 Am. St. Rep. 358; State Sav. Bank v. Albertson, 39 Mont. 414, 103 Pac. Rep. 692; State v. Mott, 29 Mont. 292, 74 Pac. Rep. 723.

Oklahoma. Jarrell v. Block, 19 Okl. 467, 92 Pac. Rep. 167, 168.

See text and notes this Supplement, § 18, ante.

Oregon. As to legislative construction of statute providing for lien on coal mines, see Escott v. Crescent C. & N. Co. (Oreg., January 25, 1910), 106 Pac. Rep. 452, 455; Portland R. L. & P. Co. v. Railroad Com. (Oreg., December 21, 1909), 105 Pac. Rep. 709.

⁵⁰ **California.** Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 524 (on petition for rehearing), 97 Pac. Rep. 414, 420.

⁵¹ **California.** Steiger T. C. & P. Works v. City of Sonoma, 9 Cal. App. 698, 703, 100 Pac. Rep. 714 (hearing in Supreme Court denied); Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 97 Pac. Rep. 419;

Additional matter to foot-note 63.⁵²

Additional matter to foot-note 65.⁵³

Additional matter to foot-note 66.⁵⁴

Hogan v. Bigler, 8 Cal. App. 71, 73, 96 Pac. Rep. 97 (hearing in Supreme Court denied), quoting from **Buell v. Brown**, 131 Cal. 158, 63 Pac. Rep. 167.

Nevada. There are certain plain requirements prescribed by the statute which are legally essential to the validity of every lien, and without which it can not be enforced. Whatever is made necessary to the existence of the lien must be performed or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of lien is indispensable: **Porteous Dec. Co. v. Fee**, 29 Nev. 375, 91 Pac. Rep. 135, 136.

Oklahoma. In such case, the law should be couched in clear and unambiguous language: **Christy v. Union O. & G. Co.** (Okla., March 21, 1911), 114 Pac. Rep. 740; **Shirley v. Union O. & G. Co.** (Okla., March 21, 1911), 114 Pac. Rep. 742.

⁵² **Oregon.** In derogation of the common law and can be established only by a plain compliance with the requirements of the statute: **Coffey v. Smith**, 52 Oreg., 538, 97 Pac. Rep. 1079, s. c. 52 Oreg. 545, 97 Pac. Rep. 1081, s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

⁵³ **Substantial compliance required:**

California. **Davis v. Treacy**, 8 Cal. App. 395, 97 Pac. Rep. 78 (hearing denied by Supreme Court).

Kansas. **Chicago L. & C. Co. v. Washington**, 80 Kan. 613, 103 Pac. Rep. 80, 82 (as to claim of lien).

Nevada. **Porteous Dec. Co. v. Fee**, 29 Nev. 375, 91 Pac. Rep. 135, 136.

Oklahoma. Implications extending the operation of the lien law in favor of subcontractors are not favored. Parties claiming rights thereunder are required to show that they can bring themselves within the plain terms of the law and where they do not, they are excluded from its benefits: **Christy v. Union O. & G. Co.** (Okla., March 21, 1911), 114 Pac. Rep. 740; **Shirley v. Union O. & G. Co.** (Okla., March 21, 1911), 114 Pac. Rep. 742.

See also **Shields v. Morrow**, 51 Tex. 393; **Ayers v. Revere**, 25 N. J. Law, 474; **Bertheolot v. Parker**, 43 Wis. 551.

⁵⁴ **Liberal construction to effect objects and promote justice:**

California. **Baker v. Lake L. C. & I. Co.**, 7 Cal. App. 482, 486, 94 Pac. Rep. 773.

Federal. **Alaska Pioneer M. Co. v. Delamotte** (C. C. A.), 185 Fed. Rep. 752, 755.

Kansas. See **Chicago L. & C. Co. v. Washington**, 80 Kan. 613, 103 Pac. Rep. 80, 82.

Utah. See **Park City M. Co. v. Comstock S. M. Co.** (Utah, June 12, 1909), 103 Pac. Rep. 254, 257.

Washington. **Cornelius v. Washington S. L.**, 52 Wash. 272, 100 Pac. Rep. 727, 729 (under **Ballinger's Ann. Codes & Stat.** § 5917; **Pierce's Code**, § 6119); **Smythe v. Lance**, 52 Wash. 560, 100 Pac. Rep. 995 (under express provision of **Ballinger's Ann. Codes & Stat.**, § 5909; **Pierce's Code**, § 6111); **Lindley v. McGlauffin**, 58 Wash. 636, 109 Pac. Rep. 118, s. c. 57 Wash. 581, 107 Pac. Rep. 355 (under **Rem. & Bal. Code**, § 1147, as to number of claims of lien that may be filed). And see **Finlay v. Tagholm** (Wash., March 8, 1911), 113 Pac. Rep. 1083, s. c. 111 Pac. Rep. 782 (as to requirement of mailing duplicate statement).

Additional matter to foot-note 67.⁵⁵

Additional matter to foot-notes 68 and 69.⁵⁶

Additional matter to foot-note 70.⁵⁷

§ 27. Same. Resume.

Paragraph 2. Add: Where, however, there is a limitation as a part of the right, and not a mere provision for repose, the lien should be considered as conditionally perfected and the rule as to construction after perfection applicable only so far as the limitation may not be affected.⁵⁸

In interpreting the mechanics' lien law, it is not to be considered as a general law relating to contracts and contractual relations, but a means provided whereby the laborer, mechanic or material-man may make known his intention to exercise his constitutional right and enforce his lien.⁵⁹

The California mechanics' lien statute is intended to supply the means for the enforcement of liens provided for by the

⁵⁵ *Montana*. See *Lane v. Lane-Potter L. Co.*, 40 Mont. 541, 107 Pac. Rep. 898.

Oregon. See *Laughlin v. Connors*, 54 Oreg. 184, 102 Pac. Rep. 793.

⁵⁶ Remedial statute; liberally construed:

Arizona. See *Murphy v. Brown (Ariz.)*, 100 Pac. Rep. 801 (construction of statute giving lien for rent).

Federal. See *Chauncey v. Dyke Bros.*, 55 C. C. A. 579, 119 Fed. 1 (*Arkansas* statute).

Montana. See *Smallhouse v. Kentucky & M. G. & S. M. Co.*, 2 Mont. 443, 445.

Nevada. *Porteous Dec. Co. v. Fee*, 29 Nev. 375, 91 Pac. Rep. 135, 136.

Oklahoma. *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 546. See *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 108 Pac. Rep. 409, 411.

⁵⁷ *Montana*. The manner of perfecting a mechanic's lien consists of various steps, which are purely statutory: *Neuman v. Grant*, 36 Mont. 77, 92 Pac. Rep. 43 (quoting from *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. Rep. 428, as set forth in note 69 to *Treatise*, ante).

⁵⁸ *Utah*. The more modern decisions are practically harmonious in holding that where there has been a substantial compliance with the statute giving the lien, and the lien has in fact been established, the lien so established will not be defeated by mere technicalities or by nice distinctions: *Park City M. Co. v. Camstock S. M. Co.* (*Utah*, June 12, 1909), 103 Pac. Rep. 254, 258; particularly, where the lien has been foreclosed, and the rights of third parties have intervened. *Ibidem*, citing this section of *Treatise*. See *Lumber Co. v. Martin*, 31 Utah 249, 87 Pac. Rep. 714.

⁵⁹ *California*. *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 524, 97 Pac. Rep. 414, 420; *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 703, 100 Pac. Rep. 714 (hearing in Supreme Court denied).

constitution,⁶⁰ and will be construed with a view to accomplish the constitutional purpose. In so far as the act affects the right to contract, it will be limited in its operation to the persons whom the constitution and statute intended to protect by giving a lien, and to such contracts of these persons as relate to and affect the lien.⁶¹

Additional matter to foot-note 79.⁶²

⁶⁰ *California*. *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 524, 97 Pac. Rep. 414, 420; *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216, s. c. 8 Cal. App. 512, 97 Pac. Rep. 218; *Steiger T. C. & P. Works v. City of Sonoma*, *supra*.

⁶¹ *California*. *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 524, 97 Pac. Rep. 414, 420; *Steiger T. C. & P. Works v. City of Sonoma*, *supra*.

⁶² *California*. *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 524, 97 Pac. Rep. 414, 420.

Wyoming. Construction of law passed by virtue of constitutional command, in the light of such command and consistent therewith, see *Burton v. Union Pac. C. Co. (Wyo.)*, 107 Pac. Rep. 391.

CHAPTER II.

CONSTITUTIONAL ASPECTS AND THE LAW APPLICABLE.

§ 28. **Constitutional Provisions creating the lien.** The earlier cases decided after the adoption of the California constitution of 1879 failed to recognize distinctly the condition of the law relating to the mandatory liens provided for by that instrument. There was no special provision in the constitution of 1849, or the amendments thereof, for a mechanic's lien. The lien law existing before the amendment of the statute in 1911¹ was enacted prior to the constitution of 1879 in its main features, and the lien, it is said, was therefore entirely a creature of statute.²

It is claimed that, up to the change in the law of 1911, no new procedure had been provided, although there were numerous amendments of the statutory provisions contained in the code.³

The phraseology of the law, which in all its provisions implied that the lien was of legislative creation, up to 1911, was not revised to meet the change caused by the adoption of the constitution of 1879, and is said to have been grammatically, at any rate, out of harmony with the view that the right of lien was due to the constitutional provision.

In the later cases the recognition of the constitutional origin of the right to the mandatory liens and the true relation of the statute is much clearer than in the earlier decisions.⁴ The construction of the constitutional provision is

¹ Stats. & Amdts. 1911, pp. 1313 et seq.

² *California*. D. I. Nofziger L. Co. v. Solomon, 13 Cal. App. 621, 110 Pac. Rep. 474, 475.

³ *California*. D. I. Nofziger L. Co. v. Solomon, *supra*. See *Germania B. & L. Assoc. v. Wagner*, 61 Cal. 349.

⁴ *California*. D. I. Nofziger L. Co. v. Solomon, 13 Cal. App. 621, 110 Pac. Rep. 474, 475; *Goldtree v. City of San Diego*, 8 Cal. App. 505, 508, 97 Pac. Rep. 216 (petition for hearing in Supreme Court denied); *s. c.*, 8 Cal. App. 512, 97 Pac. Rep. 218. See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 518, 519, 97 Pac. Rep. 414, 420; *Hampton v. Christensen*, 148 Cal. 729, 737, 84 Pac. Rep. 200, 203; *Hughes Bros. v.*

swinging towards the interpretation given by the courts of Texas and other states having similar constitutional provisions.⁵

The legislature, it is said in a recent case, has certainly gone as far in the protection of the owner by only sequestering the final payment of twenty-five per cent of the contract price under the law, as it existed before the amendment of 1911, unconditionally to the payment of the lien claims, where the contract is valid, and in considering this a sufficient reservation to cover the full value of labor done and materials furnished for which the constitution provides a lien;⁶ although by the provision for notice to the owner it was in the power of the claimant to enlarge the fund so as to meet the obligation due to him. And it has been said that the constitutional provision is self-executing.⁷

Additional matter to foot-note 2.⁸

Additional matter to foot-note 4.⁹

Additional matter to foot-note 7.¹⁰

Additional matter to foot-note 8.¹¹

Additional matter to foot-note 11.¹²

Additional matter to foot-note 12.¹³

Additional matter to foot-note 16.¹⁴

Hoover, 3 Cal. App. 150, 84 Pac. Rep. 681; Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 461, 94 Pac. Rep. 775; Barrett-Hicks Co. v. Glas (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub. nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423; Miltimore v. Nofziger Bros. L. Co., 150 Cal. 790, 90 Pac. Rep. 114.

⁵ See § 29, this Supplement, post.

⁶ California. Barrett-Hicks Co. v. Glas (Cal. App.), 111 Pac. Rep. 760, 765; s. c. 9 Cal. App. 491, 99 Pac. Rep. 856; s. c. sub. nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

⁷ California. Barrett-Hicks Co. v. Glas (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub. nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

⁸ Barrett-Hicks Co. v. Glas, supra.

⁹ Barrett-Hicks Co. v. Glas, supra.

¹⁰ Barrett-Hicks Co. v. Glas, supra; Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 519, 97 Pac. Rep. 414, 420.

¹¹ California. D. I. Nofziger L. Co. v. Solomon, 13 Cal. App. 621, 110 Pac. Rep. 474, 475.

¹² California. D. I. Nofziger L. Co. v. Solomon, 13 Cal. App. 621, 110 Pac. Rep. 474, 475.

¹³ California. D. I. Nofziger L. Co. v. Solomon, supra.

¹⁴ California. Goldtree v. City of San Diego, 8 Cal. App. 505, 508, Bloom's Sup.—2

§ 28a. Same. Application of constitutional provision to state and municipalities. Although no exception as to public and municipal property is made by the provision of the constitution of California, providing for mechanics' liens,¹⁵ by reason of other constitutional provisions and public policy, it is not to be construed as extending to municipalities or the state, and as not warranting a lien upon public property; but there is ample authority in the California decisions extending the power to the courts to render judgments against municipalities enforcing an equitable lien, under the statute, upon an improvement fund, for the benefit of subcontractors and laborers who worked upon the improvement, for the construction of which the fund was provided.¹⁶

§ 29. Same. Operation of the constitution. As already suggested,^{16a} the more recent decisions of the supreme court recognize the force of the constitutional declaration of the mandatory liens. In view of the enactment of the amendments of 1911 to the California Code of Civil Procedure, and the reactionary tendency of the later decisions of that state towards the construction given to the constitutions of Texas and other states having similar constitutional provisions, a summary of such decisions is appended.¹⁷

97 Pac. Rep. 216 (hearing in Supreme Court denied); s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

¹⁵ *California.* § 6, Art. XX, Constitution of California of 1879.

¹⁶ *California.* Goldtree v. City of San Diego, 8 Cal. App. 505, 510, 97 Pac. Rep. 216 (hearing in Supreme Court denied); s. c., 8 Cal. App. 512. See San Francisco G. Co. v. San Francisco, 9 Cal. 453; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Spring Valley W. Works v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046; 16 Am. St. Rep. 116; Contra Costa v. Breed, 139 Cal. 432, 73 Pac. Rep. 189; McConoughey v. Jackson, 101 Cal. 265, 35 Pac. Rep. 863, 40 Am. St. Rep. 53; Bates v. Santa Barbara, 90 Cal. 543, 27 Pac. Rep. 438.

See § 29a, this Supplement, post.

^{16a} § 19, note 42, and § 28, this Supplement, ante.

¹⁷ *Constitution of Georgia.* The constitution of Georgia provides that mechanics and laborers shall have a lien upon the property of their employers for labor performed or materials furnished, and the legislature shall provide for the summary enforcement of the same.

Without any action on the part of the legislature, the lien exists by virtue of the constitutional provision: Camp v. Mayer, 47 Ga. 414, 427. See, also, Love v. Cox, 68 Ga. 272; Langston v. Anderson, 69 Ga. 65; Allred v. Halle, 84 Ga. 570, 10 S. E. Rep. 1095; Stonewall Jackson S. & B. Assoc. v. McGruder, 43 Ga. 9; Georgia L. S. & B. Co. v. Dunlop, 108 Ga. 218; Tarver v. Fleming, 53 Ga. 297.

Claimants cannot be deprived of constitutional mandatory liens. Following the decisions of other states having similar constitutional provisions, it has been lately held that with-

Constitution of North Carolina. "Every building built, rebuilt or improved shall be subject to a lien for the payment of all debts contracted for work done on the same or materials furnished": Revisal of 1905, § 2016, art. 14, § 4.

See *Healey I. M. Co. v. Green* (C. C., N. C.), 181 Fed. Rep. 890, 893. "The general assembly shall provide by appropriate legislation for giving to mechanics and laborers an adequate lien upon the subject matter of their labor": Art. xiv, § 4.

See *Brayhill v. Gaither*, 119 N. C. 443.

Constitution of Texas. "Artisans, mechanics, and material-men of every class shall have a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or the material furnished therefor; and the legislature shall provide by law for the speedy and efficient enforcement of said liens": Art. 16, § 37.

Constitution is self-executing. The lien exists independently of any statutory provision by reason of this constitutional provision. It arises out of the transaction and can not be created by contract: *Houston v. Myers*, 88 Tex. 126, 129, 30 S. W. Rep. 912, 913; *Warner E. Co. v. Maverick*, 88 Tex. 489, 492; *Johnson v. Amarillo I. Co.* 88 Tex. 505, 511, 31 S. W. Rep. 503; *Oriental H. Co. v. Griffiths*, 88 Tex. 574, 583, 33 S. W. Rep. 652, 661; *Powers L. Co. v. Wade*, 15 Tex. Civ. App. 295, 298, 39 S. W. Rep. 160; *June v. Doke*, 35 Tex. Civ. App. 240, 80 S. W. Rep. 405; *Bayless v. Standard S. & L. Assoc.*, 39 Tex. Civ. App. 353; *Baldwin v. Polti*, 45 Tex. Civ. App. 638; *Strang v. Pray*, 89 Tex. 525, 35 S. W. Rep. 1054; *Berry v. McAdams*, 93 Tex. 431, 55 S. W. Rep. 1112; *Bassett v. Mills*, 89 Tex. 162, 167, 34 S. W. Rep. 93, 95; *Beneman v. Beaumont L. Co.*, 12 Tex. Civ. App. 517, 529, 34 S. W. Rep. 198; *United States & M. T. Co. v. Western S. & Mfg. Co.* (Tex. Civ. App.), 109 S. W. Rep. 377, 382; *Beilharz v. Illingsworth* (Tex. Civ. App.), 132 S. W. Rep. 106, 109; *Howell v. McMurray L. Co.* (Tex. Civ. App.), 132 S. W. Rep. 848; *Panhandle T. & T. Co. v. Kellogg S. & S. Co.* (Tex. Civ. App.), 132 S. W. Rep. 963, 965; *Blakeney v. Nalle* (Tex. Civ. App.), 101 S. W. Rep. 875.

See, also, *Implement Co. v. Electric L. Co.*, 74 Tex. 607, 2 S. W. Rep. 489; *Trammell v. Mount*, 68 Tex. 215, 4 S. W. Rep. 371; *Sullivan v. Texas B. & C. Co.*, 94 Tex. 541, 63 S. W. Rep. 307; *National Bank v. Gulf, C. & S. F. Ry. Co.*, 95 Tex. 176, 66 S. W. Rep. 203; *Guarantee S., L. & I. Co. v. Cash*, 99 Tex. 555, 91 S. W. Rep. 782; *Hord v. Owens*, 20 Tex. Civ. App. 21, 48 S. W. Rep. 201; *Waters-Pierce O. Co. v. United States & M. T. Co.*, 44 Tex. Civ. App. 397, 404. And see *Finlay v. Tagholm* (Wash., March 8, 1911), 113 Pac. Rep. 1083; s. c., 111 Pac. Rep. 782, explaining certain Texas cases above cited.

A laborer's lien is not provided for by this constitutional provision: *Partin v. Wallace* (Tex. Civ. App.), 121 S. W. Rep. 515.

The legislature is not prohibited from providing for liens in cases not mentioned in the constitutional provision, nor from making reasonable regulations for, and providing a method of, enforcing the liens provided for therein: *Bassett v. Mills*, 89 Tex. 162, 167, 34 S. W. Rep. 93, 95; *Warner E. Co. v. Maverick*, 88 Tex. 489, 493, 30 S. W. Rep. 437; *Strang v. Pray*, 89 Tex. 525, 528, 35 S. W. Rep. 1054, 1055, s. c. (Tex. Civ. App.), 34 S. W. Rep. 666.

out constitutional authority the right to the lien provided for by the constitution can not be taken away by the legislature, either by legislation or lack of legislation. The last clause of the constitutional provision requires the legislature to provide by law for the speedy and efficient enforcement of the liens, the right to which is thereby guaranteed. The question whether or not under the circumstances of the case the section was self-executing was held immaterial, since the legislature in obedience thereto had provided a good and sufficient procedure whereby the lien may be declared and enforced against municipalities.¹⁸

Rights of claimants upon abandonment. The construction given to the provisions of the statute in California¹⁹ in a recent case,²⁰ so far as it limits the right of recovery of claimants upon abandonment of the contract by the con-

Nor from prescribing the time within which the steps necessary for the protection of the owner or purchaser of such property shall be taken, as a limitation upon the time for the enforcement of the lien, and such other things as pertain to the remedy: *Strang v. Pray*, 89 Tex. 525, 528, 35 S. W. Rep. 1054, 1055, s. c. (Tex. Civ. App.), 34 S. W. Rep. 666.

And the legislature may enact a law requiring notice in writing by the subcontractor to the owner, before the latter settles with the contractor: *Berry v. McAdams*, 93 Tex. 431, 55 S. W. Rep. 112. But the legislature has no power to affix to the constitutional lien conditions of forfeiture: *Strang v. Pray*, 89 Tex. 525, 528, 35 S. W. Rep. 1054, 1055, s. c. (Tex. Civ. App.), 34 S. W. Rep. 666.

And the power to facilitate the enforcement of such lien neither includes nor implies the power to destroy it, or to hamper it by unreasonable restrictions: *Johnson v. Amarillo I. Co.*, 88 Tex. 505, 511, 31 S. W. Rep. 503.

And where there is no question of innocent purchaser involved, the constitutional lien is not lost by a failure to record the contract or bill of particulars, as directed by the statutes: *Strang v. Pray*, 89 Tex. 525, 528, 35 S. W. Rep. 1054, 1055, s. c. (Tex. Civ. App.), 34 S. W. Rep. 666. See *June v. Doke*, 35 Tex. Civ. App. 240, 245, 80 S. W. Rep. 405; *Baldwin v. Polti*, 45 Tex. Civ. App. 638; *Bellharz v. Illingsworth* (Tex. Civ. App.), 132 S. W. Rep. 106, 109; *Farmers & M. N. Bank v. Taylor*, 91 Tex. 78, 40 S. W. Rep. 876, 966; *Padgitt v. Dallas B. & C. Co.* (Tex. Civ. App.), 51 S. W. Rep. 529; *Blakeney v. Nalle* (Tex. Civ. App.), 101 S. W. Rep. 875.

¹⁸ *Goldtree v. City of San Diego*, 8 Cal. App. 505, 508, 97 Pac. Rep. 216 (petition for hearing in the Supreme Court denied); s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

See § 28a this Supplement, ante.

¹⁹ § 1200 Cal. Code Civ. Proc.

²⁰ *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 97 Pac. Rep. 152.

tractor, is not in violation of the constitutional provision recognizing the rights of mechanics and others to liens.²¹

Additional matter to foot-note 16.²²

§ 30. Raising the question of constitutionality.

Additional matter to foot-note 18.²³

Additional matter to foot-note 19.²⁴

§ 31. Constitutionality of lien statutes generally.

Additional matter to foot-note 20.²⁵

Additional matter to foot-note 21.²⁶

²¹ *California*. *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 141, 97 Pac. Rep. 155.

²² *California*. *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 475.

²³ *California*. *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 142, 97 Pac. Rep. 155. See *Davidson v. Von Detten*, 139 Cal. 467, 73 Pac. Rep. 189.

²⁴ *Idaho*. See *ex parte Gale*, 14 Idaho, 761, 95 Pac. Rep. 679.

²⁵ *Montana*. *Logging Men*. Constitutionality of Sess. Laws 1899, p. 126, Rev. Codes, §§ 5819-5836: See *Lane v. Lane-Potter L. Co.*, 40 Mont., 541, 107 Pac. Rep. 898.

New Mexico. Mechanics' lien statute constitutional as against objection that it is unreasonable, unjust, inequitable and oppressive: *Baldrige v. Morgan* (N. M., January 6, 1910), 106 Pac. Rep. 342, 344; *Nash v. Morgan* (N. M., January 6, 1910), 106 Pac. Rep. 344; *Metz v. Romero* (N. M., January 6, 1910), 106 Pac. Rep. 344.

²⁶ *Bond for release of lien.*

Washington. See *Kalb-Gilbert L. Co. v. Cram*, 57 Wash. 550, 107 Pac. Rep. 381 (bond for release of vessel); provision held constitutional.

Title of act.

Oregon. § 5668, B. & C. Comp., construction of "mining claim" in title; held constitutional: *Escott v. Crescent C. & N. Co.* (Oreg., January 25, 1910), 106 Pac. Rep. 452, 454.

Washington. Laws 1909, c. 45, requiring material-men to deliver duplicate statement at time of delivery of material; held constitutional: *Finlay v. Tagholm* (Wash., November 22, 1910), 111 Pac. Rep. 732; s. c., 113 Pac. Rep. 1083; *Spokane G. & T. Co. v. Lyttaker* (Wash., June 16, 1910), 109 Pac. Rep. 316.

Power to employ aliens.

California. Contract or statute prohibiting employment of aliens held unconstitutional: *City S. I. Co. v. Kroh*, 158 Cal. 308, 110 Pac. Rep. 933, 941. See *Chicago v. Hurlbert*, 205 Ill. 363, 68 N. E. Rep. 786; *People v. Warren*, 34 N. Y. Supp. 943, 13 Misc. Rep. 615; *Estate of Ghio* (Cal. Sup.), 108 Pac. Rep. 516.

Jurisdiction of the person and proof thereof.

California. Sufficient affidavit of service by publication and constitutionality of such service as due process of law: See *Roberts v. Jacob*, 154 Cal. 307, 97 Pac. Rep. 671. See *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 268, 97 Pac. Rep. 516.

Additional matter to foot-note 22.²⁷

Additional matter to foot-note 24.²⁸

Additional matter to foot-note 25.²⁹

Additional matter to foot-notes 26, 27 and 28.³⁰

Additional matter to foot-note 29.³¹

New Mexico. Essential elements of due process of law in action to foreclose mechanic's lien: *Robertson v. Mine & S. S. Co.* (N. M., August 29, 1910), 110 Pac. Rep. 1037. See *Simon v. Craft*, 182 U. S. 427, 436, 21 Sup. Ct. Rep. 836, 45 L. ed. 1165.

Police Power. Hours of employment.

Colorado. Act regulating hours of employment, held unconstitutional: See *Burcher v. People*, 41 Colo. 495, 93 Pac. Rep. 14.

Oklahoma. Eight-hour law, employment by state, county or municipality, Sess. Laws 1908, p. 517, c. 53, art. 4, enacted in pursuance of § 1, art. 23, constitution (§ 435 Bunn's ed.), held constitutional: *Byers v. State*, 24 Okl. Cr. Ct. App. 811, 102 Pac. Rep. 804. See *Atkin v. State of Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832; *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. ed. 186; *Ashby's case*, 60 Kan. 101, 55 Pac. Rep. 336, 338; *Ryan v. City of New York*, 177 N. Y. 271, 69 N. E. Rep. 599; *Clark v. State of New York*, 142 N. Y. 101, 36 N. E. Rep. 817. See *Ex parte Donnellan*, 49 Wash. 460, 95 Pac. Rep. 1085 (Sunday law).

Public safety. Powder.

Kansas. Law relating to the sale and delivery of powder at mines; held constitutional: *Ex parte Williams*, 79 Kan. 212, 98 Pac. Rep. 777.

Construction of public buildings, law relating to; held constitutional: *State v. Board of Comm'rs*, 77 Kan. 527, 94 Pac. Rep. 1004.

27 See § 41a this Supplement, post.

Municipal ordinances: Restricting building permits for construction of stable, held unreasonable: *Coon v. Board of Public Works*, 7 Cal. App. 760, 95 Pac. Rep. 913.

Fire limits, ordinance held not retroactive; repairing building:

Oregon. *Morton v. Wessinger* (Oreg., February 14, 1911), 113 Pac. Rep. 7. See *Glenn v. City*, 5 Gill & J. (Md.), 424; *City of Buffalo v. Chadeayne*, 134 N. Y. 163, 165, 31 N. E. Rep. 443.

Washington. Laws 1893, ch. xxiv, p. 32, § 1: See *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766.

Oklahoma. Imposing license tax on "contractors and persons doing contract work," beyond the power given by legislature to impose tax on "contractors" merely: *Ex parte Unger*, 22 Okl., 755, 98 Pac. Rep. 999. See *State v. McNally*, 45 La. Ann. 44, 12 South. Rep. 117.

28 **New Mexico.** See this Supplement, § 33, post. *Baldrige v. Morgan* (N. M., January 6, 1910), 106 Pac. Rep. 342.

29 **California.** See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 518, 97 Pac. Rep. 414, 420.

30 **California.** See *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 475.

31 **California.** See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 518, 519, 97 Pac. Rep. 414, 420.

§ 33. **Same. Valid contract.** In a number of states the constitutionality of statutes permitting liens in excess of the contract price agreed upon between the owner and contractor has been upheld.³² But in California it is said that the general constitutional principle underlying the mechanic's lien is that the liability of the owner who has on his part complied with all of the terms of a valid contract is limited to the price which by his contract he has agreed to pay.³³

Abandonment. Where the contractor fails to perform his undertaking the owner is made liable for such proportion of the contract price as represents the value of the work already done. When he is without any default on his part, burdened with the cost of completing the building, it is but fair and just that he should be relieved of the obligation to pay to the original contractor or those claiming under him so much of the contract price as corresponds to the portion of the work left undone. In no other way, it is said, can he be protected in his constitutional right to have his liability limited to the amount which by a valid contract he has agreed to pay.³⁴

³² **Federal.** See *N. M. and Ohio*, this note, post.

Massachusetts. *Bowen v. Phinney*, 162 Mass. 593, 39 N. E. Rep. 283, 44 Am. St. Rep. 391.

Minnesota. *Laird v. Moonan*, 32 Minn. 358, 20 N. W. Rep. 354.

New Mexico. *Baldrige v. Morgan* (N. M., January 6, 1910), 106 Pac. Rep. 342; *Nash v. Morgan* (N. M., January 6, 1910), 106 Pac. Rep. 344; *Metz v. Romero* (N. M., January 6, 1910), 106 Pac. Rep. 344. See *Springer L. Assoc. v. Ford*, 168 U. S. 513, 18 Sup. Ct. 170, 42 L. ed. 562.

Ohio. *Great Southern F. P. Co. v. Jones*, 193 U. S. 532, 29 Sup. Ct. 576, 48 L. ed. 778; s. c., 86 Fed. Rep. 370, 30 C. C. A. 108. See *Baldrige v. Morgan* (N. M., January 6, 1910), 106 Pac. Rep. 342.

Oklahoma. See *Christy v. Union O. & G. Co.* (Okla., March 21, 1911), 114 Pac. Rep. 740; *Shirley v. Union O. & G. Co.* (Okla., March 21, 1911), 114 Pac. Rep. 742.

Tennessee. *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. Rep. 1045.

Wisconsin. *Mallory v. La Crosse A. Co.*, 80 Wis. 170, 49 N. W. Rep. 1071.

³³ **California.** *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, 97 Pac. Rep. 152, citing *Kellogg v. Howes*, 81 Cal. 179; *Stimson M. Co. v. Braun*, 136 Cal. 122, 68 Pac. Rep. 481, 89 Am. St. Rep. 116; *Latson v. Nelson*, 11 Pac. Coast L. J. 589.

³⁴ **California.** *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, 97 Pac. Rep. 152. See *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 704, 100 Pac. Rep. 714.

These decisions had reference to the law before the Amendments of 1911.

Interest. The allowance of interest to the lien claimant, however, is held not to render the statute unconstitutional.³⁵

Additional matter to foot-note 31.³⁶

§ 34. Same. Power of reputed owner. Estoppel.

Additional matter to foot-notes 38 and 40.³⁷

§ 35. "Impairing obligation of contract."³⁸

§ 36. Retroactive laws. Where all the proceedings in an action are had prior to the enactment of an amendment to a section of the statute, it can have no effect on the validity or invalidity of a lien.³⁹

Additional matter to foot-notes 46, 47 and 48.⁴⁰

³⁵ *California.* Burnett v. Glas, 154 Cal. 249, 260, 97 Pac. Rep. 423; s. c., sub. nom. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. Rep. 856.

³⁶ *New Mexico.* §§ 2216 et seq. Comp. Laws 1897 are not unconstitutional because they permit liens in excess of the contract price of the building or other improvement on the ground that the statute is a restraint of the liberty of contract or the taking of property without due process of law: Baldrige v. Morgan (N. M., January 6, 1910), 106 Pac. Rep. 342; Nash v. Morgan (N. M., January 6, 1910), 106 Pac. Rep. 344; Metz v. Romero (N. M., January 6, 1910), 106 Pac. Rep. 344.

Oklahoma. See contra to text Church v. Union O. & G. Co. (Okl., March 21, 1911), 114 Pac. Rep. 740; Shirley v. Union O. & G. Co. (Okl., March 21, 1911), 114 Pac. Rep. 742.

³⁷ *California.* See Holt Mfg. Co. v. Collins, 154 Cal. 265, 268, 97 Pac. Rep. 516.

Kansas. See Robert Garrett L. Co. v. Loftus, 82 Kan. 556, 109 Pac. Rep. 179, 180 (improvement of wife's property by husband), explaining Bethell v. Lumber Co., 39 Kan. 230, 17 Pac. Rep. 813.

³⁸ See notes, §§ 33 et seq., ante.

Washington. See Strand v. Griffith (Wash., May 10, 1911), 115 Pac. Rep. 512 (new statute delaying sale upon foreclosure of mortgage, unconstitutional, if applied to existing contracts; but change as to posting notices of sale, affecting only remedy, constitutional).

³⁹ *California.* D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 91, 101 Pac. Rep. 38 (with reference to § 1203a Code Civ. Proc., relating to mistakes, etc.).

⁴⁰ *Kansas.* Same principle, see Fossett v. Rock-Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 835; Nixon v. Cydon Lodge, 56 Kan. 298, 43 Pac. Rep. 236; Groesbeck v. Barger, 1 Kan. App. 61, 41 Pac. Rep. 402; Hotel Co. v. Hardware Co., 56 Kan. 448, 43 Pac. Rep. 769.

Washington. See Strand v. Griffith (Wash., May 10, 1911), 115 Pac. Rep. 512 (change in manner of posting notice).

§ 37. Homestead. Priorities.

Additional matter to foot-notes 54 and 55.⁴¹

§ 38. Repeals.

Additional matter to foot-note 57.⁴²

§ 39. Contractor's bond.

Additional matter to foot-note 59.⁴³

§ 40. Attorney's fees.

Additional matter to foot-note 62.⁴⁴

Additional matter to foot-note 63.⁴⁵

⁴¹ **Texas.** Under the constitution, mechanic's lien held prior to homestead, under certain circumstances: See *Summerville v. King*, 98 Tex. 332, 338, 83 S. W. Rep. 680.

Utah. See *Volver-Scowcroft L. Co. v. Vance* (Utah, August 26, 1909), 103 Pac. Rep. 970, affirming s. c. 32 Utah 74, 88 Pac. Rep. 896; holding that the homestead is not subject to a mechanic's lien in the absence of an express contract, and recognizing the general proposition of the text.

Washington. *Olson v. Goodsell*, 56 Wash. 251, 105 Pac. Rep. 463. See *Hookway v. Thompson* (Wash.), 105 Pac. Rep. 153 (mortgage).

⁴² **Michigan.** See *Hanes v. Wadey*, 73 Mich. 178, 41 N. W. Rep. 222, 2 L. R. A. 498.

⁴³ **Washington.** Act 1893, ch. xxiv, p. 32: See, explaining cases cited in Treatise, and construction of ch. 116, p. 229, Laws 1905, amending said act, *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766.

⁴⁴ **Alaska.** Attorney's fees allowable: See *Pioneer M. Co. v. Delamotte* (C. C. A.), 185 Fed. Rep. 752, 756 (syllabus misleading).

Federal. See *Cascaden v. Wimbich*, 161 Fed. Rep. 241, 88 C. C. A. 277; *Iowa L. I. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. ed. 204; *Fidelity L. I. Assoc. Co. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. ed. 922.

Montana. See this section, following note.

New Mexico. *Gray v. New Mexico P. S. Co.*, 110 Pac. Rep. 603, 605. See *Baldrige v. Morgan* (N. M.), 106 Pac. Rep. 342; *Cascaden v. Wimbich*, 161 Fed. Rep. 241, 88 C. C. A. 277.

⁴⁵ **Attorney's fees unconstitutional:**

Alabama. See *Southern & N. A. Ry. Co. v. Morris*, 65 Ala. 193; *Randolph v. Builders*, etc., S. Co., 106 Ala. 501, 17 South. Rep. 721.

California. *Burnett v. Glas*, 154 Cal. 249, 260, 97 Pac. Rep. 423; s. c., sub. nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; *Merced L. Co. v. Bruschi*, 152 Cal. 372, 375, 92 Pac. Rep. 844; *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 274, 96 Pac. Rep. 788; *Builders' S. Depot v. O'Connor*, 150 Cal. 265, 88 Pac. Rep. 983, 119 Am. St. Rep. 193, 17 L. R. A. (N. S.), 909. See, also, *Stimson M. Co. v. Nolan*, 5 Cal. App. 754, 91 Pac. Rep. 262; *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. Rep. 382; *Los Angeles P. B. Co. v.*

§ 41. **Jurisdiction. Special case.** But where the complaint fails to state a cause of action for the foreclosure of the lien, the California Superior Court has no jurisdiction to entertain a cause of action for a money judgment or for services rendered of a value less than three hundred dollars.⁴⁶

Higgins. 8 Cal. App. 514, 97 Pac. Rep. 414, 420; *Johnson v. Goodyear M. Co.*, 127 Cal. 4, 59 Pac. Rep. 304, 78 Am. St. Rep. 17, 47 L. R. A. 338.

But see *Engebretson v. Gay*, 158 Cal. 30, 109 Pac. Rep. 880, s. c. 158 Cal. 27, 109 Pac. Rep. 879; s. c., sub. nom. *Gay v. Engebretson*, 158 Cal. 21, 109 Pac. Rep. 877 (attorney's fee on foreclosure of street assessment lien, held constitutional; and see authorities therein cited, and distinctions made).

Colorado. See *Denver & R. G. R. Co. v. Outcault*, 2 Colo. App. 395, 31 Pac. Rep. 177.

Federal. *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 225, 41 L. ed. 666. See *Greene v. Briggs*, 1 Curtis (U. S.), 327 Fed. Cas. No. 5764.

Georgia. *Phoenix I. Co. v. Hart*, 112 Ga. 765, 38 S. E. Rep. 67.

Idaho. *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho, 5, 93 Pac. Rep. 789, 799, 92 Pac. Rep. 980.

Illinois. See *Braceville C. Co. v. People*, 147 Ill. 66, 35 N. E. Rep. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340; *Millett v. People*, 117 Ill. 294, 7 N. E. Rep. 631, 57 Am. Rep. 869; *Peoria & E. Ry. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619.

Kentucky. See *Gordon v. Winchester Assoc.*, 12 Bush (Ky.), 110, 23 Am. Rep. 713.

Michigan. See *Grand Rapids C. Co. v. Remells*, 77 Mich. 104, 43 N. W. Rep. 1006; *Wilder v. C. & W. Mich. Ry. Co.*, 70 Mich. 382, 38 N. W. Rep. 289.

Mississippi. See *Chicago, St. L. & M. Ry. Co. v. Moss*, 60 Miss. 641.

Missouri. See *Paddock v. Missouri Pac. Ry. Co.*, 155 Mo. 524, 56 S. W. Rep. 453; *West v. Wabash R. Co.*, 118 Mo. App. 432, 94 S. W. Rep. 310.

Montana. *Mills v. Olson* (Mont., March 29, 1911), 115 Pac. Rep. 33, 36 (under Rev. St., § 7166), overruling *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. Rep. 280.

Nebraska. See *Atchison & Neb. R. Co. v. Boty*, 6 Neb. 37, 29 Am. Rep. 356a.

Ohio. See *Hocking Valley C. Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. Rep. 263, 29 L. R. A. 386.

Oklahoma. *Chicago, R. I. & P. Ry. Co. v. Mashore*, 21 Okl. 275, 96 Pac. Rep. 630, 633 (under § 1, c. 87, par. 6915, *Wilson's Rev. & Ann. St. Okl.*, 1903).

Texas. See *Antonia & A. P. Ry. v. Wilson* (Tex. App.), 19 S. W. Rep. 910.

Utah. See *Openshaw v. Halpin*, 24 Utah 426, 68 Pac. Rep. 138, 91 Am. St. Rep. 796.

Wisconsin. See *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500.

⁴⁶ **California.** *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. Rep. 78 (hearing in Supreme Court denied).

See this Supplement, §§ 653 et seq., post.

§ 41a. **Municipal control over building.** The construction of improvements upon private property within a city is not a municipal affair, within the meaning of the constitution; and the city has no interest therein or control thereof, except such control as may be necessary for the protection of the public welfare, under the police power delegated by the constitution to chartered cities. Such police power, however, is expressly made subordinate to the general law. And, so, the matter of the size and character of buildings constructed or to be constructed within the limits of a chartered city and of regulations relating thereto are not municipal affairs.⁴⁷

Equity case; appeal direct to Supreme Court: *Stockton L. Co. v. Schuler*, 7 Cal. App. 257, 94 Pac. Rep. 399.

⁴⁷ **California.** *May v. Craig*, 13 Cal. App. 368, 109 Pac. Rep. 842.

See Ordinances, § 31, foot-note 21, Treatise, and notes to § 31, this Supplement, ante.

CHAPTER III.

PERSONS ENTITLED. IN GENERAL.

§ 42. Constitutional and legislative classifications.¹

§ 43. Classification as to relation to owner or employer.²

Additional matter to foot-note 8.³

Additional matter to foot-note 9.⁴

§ 44. Same. As to individuality of claimants.⁵

Additional matter to foot-note 10.⁶

Additional matter to foot-note 11.⁷

Additional matter to foot-note 12.⁸

¹ See notes to §§ 28 et seq., this Supplement, ante.

² See notes to §§ 572 et seq., this Supplement, post.

³ Strike out note "In interpreting mechanic's-lien law," etc.

⁴ See "Privity," §§ 49 and 695, and "Agency," §§ 572 et seq., Treatise and this Supplement.

Oregon. See *Litherland v. S. Morton Cohn R. E. & I. Co.*, 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303; *Smith v. Wilcox*, 44 Oreg., 323, 74 Pac. Rep. 708, 75 Pac. Rep. 710.

⁵ **Washington.** Definition of "claimants," found in decree, see *North Coast Ry. Co. v. Hess*, 56 Wash. 335, 105 Pac. Rep. 853, 855.

Claim of lien of guardian: See *Smythe v. Lance*, 52 Wash. 560, 100 Pac. Rep. 995.

⁶ **Arizona.** **Suit by assignee of claim:** See *Harper v. Independence D. Co.* (Ariz., April 2, 1910), 108 Pac. Rep. 701, 703.

⁷ **Partnership:**

California. See *Lucas v. Gobbi*, 10 Cal. App. 648, 653, 103 Pac. Rep. 157.

Idaho. See *Naylor v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, s. c., 95 Pac. Rep. 827.

Montana. Action by partnership, doing business under a fictitious name, for work and material: See *Wilson v. Yeger Bros.*, 38 Mont. 504, 100 Pac. Rep. 613.

Washington. *Malfa v. Crisp*, 52 Wash. 509, 100 Pac. Rep. 1012 (doing business in fictitious name—filing certificate—pleading).

⁸ **Corporation:**

California. *Coghlan v. Quarataro* (Cal. App., March 21, 1911), 115 Pac. Rep. 664, 667 (hearing by Supreme Court denied).

Idaho. Foreign corporation: See *Valley L. Co. v. Driessell*, 13 Idaho 662, 93 Pac. Rep. 765, 770 (failure to file articles of incorporation—cases reviewed).

Kansas. Compare *Shores v. United S. Co.* (Kan. April 8, 1911), 114 Pac. Rep. 1062.

New Mexico. Foreign corporation as claimant: See *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706.

Washington. See *Pacific I. & S. Works v. Goerig*, 55 Wash. 149, 104 Pac. Rep. 151.

CHAPTER IV.

ORIGINAL CONTRACTORS.

§ 45. Definition of "original contractor."¹

Additional matter to foot-note 1.²

§ 46. Same. One test. Intermediate liens. There is nothing in the spirit or letter of the mechanics' lien law which indicates that the subclaimants' liens can be affected by the obligations which exist between the contractor and subcontractor.³

Additional matter to foot-note 6.⁴

¹ *Idaho*. See New Mexico, this note, post.

Louisiana. See *State v. McNally*, 45 La. Ann. 44, 12 South. Rep. 117.

New Mexico. There has been much diversity of opinion and confusion as to the meaning of the words "original contractor" in a statute like the New Mexico statute (§ 2221, Comp. L.), but we think that the Idaho court, under a statute identical in terms with ours, has announced the true rule, namely, that every person who deals directly with the owner of the property and who in pursuance of a contract with him performs labor or furnishes material is an original contractor within the meaning of the statute (*Colorado I. Works v. Rieckenberg*, 4 Idaho 262, 38 Pac. Rep. 651). The same holding prevails in *Texas*, *Missouri*, *Virginia* and *Wisconsin*, and the cases from those states are cited in the Idaho opinion: *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 605. (This definition would hardly cover all of the questions that might arise under the statute, as shown in the text of the Treatise.)

Montana. Independent Contractor, under logging lien law: See *Lane v. Lane Potter L. Co.*, 40 Mont. 541, 107 Pac. Rep. 898.

Oklahoma. See *Ex parte Unger*, 22 Okl. 755, 98 Pac. Rep. 999.

Pennsylvania. See *Brown v. German-American T. & T. Co.*, 174 Pa. 443, 34 Atl. Rep. 335.

² *Washington*. The contractor has a lien for the contract price, irrespective of the fact that he performed no service further than overseeing the construction of the building, according to his contract: *Smythe v. Lance*, 52 Wash. 560, 100 Pac. Rep. 995.

³ *California*. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775. See *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 271, 96 Pac. Rep. 788.

See § 54 this Supplement, post.

⁴ *California*. *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714 (tiling for roof and placing same in position).

§ 47. Same. Four essential factors.⁵

§ 48. Same. Two or more original contractors.⁶

§ 49. First test. Privity.⁷

Additional matter to foot-note 10.⁸

§ 50. Same. Holder of legal title.⁹

§ 51. Same. Tenant.¹⁰

§ 52. Same. Void contract.¹¹

§ 53. Same. Implied original contract.¹²

§ 54. Second test. Intermediate lienholders.

Additional matter to foot-note 19.¹³

⁵ See this Supplement, §§ 49 et seq., post.

⁶ *California*. See *Seebach v. Kuhn*, 9 Cal. App. 485, 486, 99 Pac. Rep. 723.

Oklahoma. See *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 548. See § 59, Treatise.

⁷ *Definition of privity*: *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 273; *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. Rep. 430, 11 Am. St. Rep. 159; and see *Lipcomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651.

⁸ *Oregon*. See *Equitable S. & L. Assoc. v. Hewitt (Oreg.)*, 106 Pac. Rep. 447, 450.

As to whether party original contractor or subcontractor: See *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

Privity:

Idaho. See *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Washington. See *Erickson v. Hochbrune*, 47 Wash. 33, 91 Pac. Rep. 485.

⁹ See § 67 Treatise.

¹⁰ See §§ 464, 467, 477, this Supplement, post.

¹¹ See § 67 Treatise. Statutory original contract abolished (Stats. & Amdts. 1911, pp. 1313 et seq.).

Colorado. Nor when the statutory original contract is not filed: *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

¹² *California*. Statutory original contract abolished (Stats. & Amdts. 1911, pp. 1313 et seq.).

¹³ See § 46 this Supplement, ante.

California. *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 271, 96 Pac. Rep. 788.

Washington. See *Pennsylvania C. Co. v. Washington P. C. Co.*, (Wash. June 27, 1911), 116 Pac. Rep. 284.

§ 55. Same. Agency.Additional matter to foot-note 20.¹⁴**§ 56. Same. Direct contract with owner.¹⁵****§ 57. Same. Material-man.**Additional matter to foot-note 25.¹⁶**§ 58. Third test. Personal liability.¹⁷****§ 59. Fourth test. Labor contract.¹⁸**Additional matter to foot-note 28.¹⁹

¹⁴ **California.** See *Loma Prieta L. Co. v. Hinton*, 12 Cal. App. 766, 108 Pac. Rep. 766, 108 Pac. Rep. 528.

Idaho. *Valley L. Mfg. Co. v. Nickerson*, 13 Idaho 682, 98 Pac. Rep. 24, 27.

Oregon. See *Equitable S. & L. Assoc. v. Hewitt* (Oreg.), 106 Pac. Rep. 447, 450; *Litherland v. S. Morton Cohn R. E. & I. Co.* 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303; *Smith v. Wilcox*, 44 Oreg. 223, 74 Pac. Rep. 708, 75 Pac. Rep. 710.

Washington. See *Pennsylvania C. Co. v. Washington P. C. Co.* (Wash., June 27, 1911), 116 Pac. Rep. 284.

¹⁵ See §§ 77 et seq., post.

¹⁶ **California.** See *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714.

¹⁷ Compare distinction, servant and independent contractor, in the law of negligence:

California. *Gay v. Engebretson*, 158 Cal. 21, 109 Pac. Rep. 877; s. c., sub. nom. *Engebretson v. Gay*, 158 Cal. 27, 30, 109 Pac. Rep. 879, 880; *Pearson v. M. M. Potter Co.*, 10 Cal. App. 245, 101 Pac. Rep. 681, and cases cited.

Kansas. See *Nelson v. American C. P. Co.* (Kan., May 6, 1911), 115 Pac. Rep. 578.

Montana. See *Poor v. Madison R. P. Co.*, 38 Mont. 341, 99 Pac. Rep. 947; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. Rep. 906.

Independent contractor:

Kansas. See *Chute v. Moeser*, 77 Kan. 706, 95 Pac. Rep. 398.

Utah. See *Morris v. Salt Lake City*, 25 Utah 474, 101 Pac. Rep. 378.

¹⁸ **Washington.** See *Cary v. Sparkman & McLean Co.* (Wash., March 8, 1911), 113 Pac. Rep. 1093.

¹⁹ **Oklahoma.** "Persons doing contract work": See *Ex parte Unger*, 22 Okl. 755, 98 Pac. Rep. 999. See *State v. McNally*, 45 La. Ann. 44, 12 South. Rep. 117.

See § 48 Treatise.

Washington. It is not necessary that the original contractor should personally perform labor on the structure to have a lien: *Smythe v. Lance*, 52 Wash. 560, 100 Pac. Rep. 995.

§ 60. Distinction between "original contractor" and "material-man."

Additional matter to foot-note 33.²⁰

§ 61. General rights of original contractors. As against person who "caused" improvement to be made.

Notice to withhold. Under the statute of California, section eleven hundred and eighty-three of the Code of Civil Procedure, before amendment of 1911, the original contractor was, of course, not entitled to serve notice on the owner to withhold payment.²¹

Under valid contract. As the statute stood, before the amendment of 1911, in California, as well as elsewhere, in general, the original contractor could recover for a substantial performance of the contract, under the modern equitable doctrine, the owner being protected by recoupment for deficiencies.²²

Additional matter to foot-note 45.²³

Additional matter to foot-note 46.²⁴

Additional matter to foot-note 49.²⁵

§ 62. Same. As against other persons in privity with him. The statute does not attempt to define or interfere with the contractual relations between the contractor and

²⁰ **California.** Steiger T. C. & P. Works v. City of Sonoma, 9 Cal. App. 698, 100 Pac. Rep. 714.

²¹ **California.** Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

²² **California.** Seebach v. Kuhn, 9 Cal. App. 485, 488, 99 Pac. Rep. 723.

Utah. Foulger v. McGrath, 34 Utah 86, 95 Pac. Rep. 1004, 1006.

See doctrine in detail, §§ 341-345 Treatise and this Supplement.

²³ **California.** And he may recover a personal judgment, if the lien fails: Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 524, 526, 97 Pac. Rep. 414, 420.

Kansas. Fossett v. Rock-Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 838, 839.

²⁴ **California.** Compare Dahlberg v. Girsch, 157 Cal. 324, 330, 107 Pac. Rep. 616.

Washington. Contractor has a lien for the contract price: Smythe v. Lance, 52 Wash. 560, 100 Pac. Rep. 995.

²⁵ **California.** See L. A. P. B. Co. v. Higgins, 8 Cal. App. 514, 524, 97 Pac. Rep. 414, 420.

his subcontractor until the subcontractor has brought himself within the provisions of the mechanics' lien law.²⁶

Additional matter to foot-note 52.²⁷

Additional matter to foot-note 53.²⁸

§ 63. Same. As against other persons. Where the contractor enters into a contract with a third person for work and material, and not for the purchase of material merely, in the absence of an express agreement, no title passes from the vendor until it is affixed to the freehold, so far as the contractor is concerned.²⁹

§ 64. General obligations of original contractors.

Additional matter to foot-note 57.³⁰

Additional matter to foot-note 58.³¹

Additional matter to foot-note 60.³²

²⁶ **California.** *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714 (said with reference to question of abandonment).

²⁷ **California.** *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

Oklahoma. *Vandenberg v. P. T. Walton L. Co.*, 19 Okl., 169, 92 Pac. Rep. 149, 150.

²⁸ **California.** *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

²⁹ **California.** *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714.

Louisiana. See *Cameron v. Orleans & J. Ry. Co.*, 108 La. 83, 32 South. Rep. 208; *Orleans & J. Ry. Co. v. International Const. Co.*, 108 La. 82, 32 South. Rep. 18 (materials for street railway).

Wisconsin. *Chandler v. De Graff*, 22 Minn. 471 (railroad ties for railway).

³⁰ See doctrine in detail, §§ 341-345, Treatise and this Supplement. And see § 61, this Supplement, ante.

California. *Seebach v. Kuhn*, 9 Cal. App. 485, 488, 99 Pac. Rep. 723.

Kansas. See *Fossett v. Rock-Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 823, 838, 839.

Oklahoma. *Vandenberg v. P. T. Walton L. Co.* 19 Okl. 169, 92 Pac. Rep. 150.

Oregon. In good faith: *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533, 534.

Utah. *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004, 1006, 1007.

³¹ **Utah.** See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004, 1006, 1007.

See Performance, § 339 Treatise and this Supplement.

³² **California.** See *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616.

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Additional matter to foot-note 61.³³

Additional matter to foot-note 63.³⁴

§ 65. **Same. To other persons.**³⁵ The subcontractor or material-man may recover a personal judgment against the contractor for labor or materials furnished to him at his request.³⁶

Additional matter to foot-note 65.³⁷

Additional matter to foot-note 68.³⁸

§ 65a. **Same. Where the original contractor pays to the subcontractor his indebtedness to him, after the statutory notice to withhold payment has been served on the owner**

³³ **Oklahoma.** See *Vandenberg v. P. T. Walton L. Co.*, 19 Okl. 169, 92 Pac. Rep. 149, 150.

³⁴ **California.** *Klokke v. Raphael*, 8 Cal. App. 1, 5, 96 Pac. Rep. 392.
Kansas. *Wichita S. & D. Co. v. Well*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

Oklahoma. It is not the contractor's duty to defend against the liens of subclaimants under his subclaimants; but it is his duty to pay the moneys due under the original contract in a manner to protect the building and owner from liens caused by his subclaimants' contracts, after a decree establishing the liens; he has a right to insist that such liens shall be established by decree of court, and payment by the contractor before that time is at his peril. It is his duty to show to the court by proper pleading and proof the amount which his subcontractors or those entitled to liens under them are entitled to receive. It is his duty and that of those claiming liens under him to protect themselves against unlawful claims. Nothing here said is to indicate that the original contractor is not bound to protect the building from liens, but the building is under the circumstances liable only to the amount of the contract price: *Vandenberg v. P. T. Walton L. Co.*, 19 Okl. 169, 92 Pac. Rep. 149, 150.

³⁵ See § 58, this Supplement, independent contractor.

Utah. Action against contractor and municipality for damages to abutting property in performance of contract: See *Morris v. Salt Lake City*, 35 Utah 474, 101 Pac. Rep. 373.

³⁶ **California.** *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 515, 97 Pac. Rep. 414, 420.

Colorado. See *Estey v. Halleck & Howard L. Co.*, 4 Colo. App. 165, 34 Pac. Rep. 1114.

Oklahoma. *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 546.

Washington. *Rasmussen v. Liming*, 50 Wash. 184, 96 Pac. Rep. 1044.

³⁷ **Oregon.** Contractor under no obligation to pay owner's claimant: See *McInnis v. Buchanan*, 53 Ore. 229, 99 Pac. Rep. 929, 930.

Wisconsin. See *Walker v. Newton*, 53 Wis. 336, 10 N. W. Rep. 436.

³⁸ **California.** *Goldtree v. City of San Diego*, 8 Cal. App. 505, 506, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Oklahoma. See *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 546.

by such subcontractor's subclaimants under a statutory original contract, even if the contractor is not notified of the claim of such subclaimants, it does not affect the lien on the fund in the hands of the owner nor the lien upon the property, where there is moneys in the hands of the owner due to the original contractor, under the terms of the original contract, at the time of the service of the notice.³⁹ The original contractor is not liable to the subcontractor when the contract between them embodies the original contract by proper reference and when under the terms of the original contract the original contractor can not recover from the owner by reason of the destruction of the building.⁴⁰

§ 65b. Death of owner. Presentation of claim. When the owner dies after making a construction contract, the contractor must present his claim to the personal representative within the time required by law, where no claim of lien has been filed against the property improved, or the contractor has no claim against the estate.⁴¹

³⁹ *California*. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 94 Pac. Rep. 775.

⁴⁰ *California*. Watson v. Alta I. Co., 12 Cal. App. 560, 565, 108 Pac. Rep. 48; Watson v. Alta I. Co., 12 Cal. App. 566, 108 Pac. Rep. 50 (hearing in Supreme Court denied).

⁴¹ *California*. In re Hinchon's Estate (Cal. Sup., May 16, 1911; on rehearing in bank June 15, 1911), 116 Pac. Rep. 47.

CHAPTER V.

SUBCONTRACTORS.

§ 66. Definition of "subcontractor."¹**Subcontractor not required to perform personal labor.**

The fact that the subcontractor himself does not perform personal labor upon the building, but does the work through his own subcontractors, employees or laborers, does not prevent him from obtaining a lien, which will cover the liens of all of his subclaimants.²

Additional matter to foot-note 1.³

§ 67. Different degrees of subcontractors.

Additional matter to foot-note 4.⁴

§ 68. Distinction. Subcontractor and material-man.⁵

¹ **Washington.** The term subcontractor has a well defined meaning in building contracts. A subcontractor is one who takes from the principal contractor a specific part of the work and the term does not include laborers or material-men; *Young Men's C. Assoc. of North Yakima v. Gibson*, 58 Wash. 307, 108 Pac. Rep. 766, 769. See *Farmers' L. & T. Co. v. Canada & St. L. Ry. Co.*, 127 Ind. 250, 26 N. E. Rep. 784, 11 L. R. A. 740.

² **California.** *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

Washington. *Smythe v. Lance*, 52 Washington 560, 100 Pac. Rep. 995 (under *Ballinger's Ann. C. & S.*, § 5900—*Pierce's Code*, § 6102). See *Powell v. Nolan*, 27 Wash. 318, 341, 67 Pac. Rep. 712, 720, 68 Pac. Rep. 389; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. Rep. 844, 85 Am. St. Rep. 966.

³ **Colorado.** The statute designates all subclaimants as "subcontractors": *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

Oregon. As to whether party is original contractor or subcontractor, see *Coffey v. Smith*, 52 Oreg. 338, 97 Pac. Rep. 1079, s. c., 52 Oreg. 545, 97 Pac. Rep. 1081, s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

⁴ **Colorado.** And the same rule applies where the statutory original contract, or the memorandum thereof, is not filed as required by the statute: *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

⁵ **California.** See *Steigér T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714.

The statute does not authorize a lien in favor of one who is a subcontractor under a subcontractor in the following states:

Additional matter to foot-note 5.⁶

§ 69. Same. Subcontractor and employees of material-man.⁷

§ 69a. Lessor of means or appliances of construction. In the absence of a statute expressly authorizing the same,⁸ where a person simply lets to the original contractor, without reserving any control over the same, tools, machinery or appliances, or means of bringing into existence the object constructed, such as horses and harness furnished to the contractor at a stipulated price per month per horse, the contractor having full control of the horses during the time of hiring, and paying the drivers thereof, such person does not "bestow" labor upon the structure and is not a subcontractor, and occupies no contractual position whatever respecting the work.⁹

The subcontractor may "bestow" labor, as the term is used in the statute, through his servants and employees, without personally laboring on the structure.¹⁰

§ 70. General rights of subcontractors.¹¹

Kansas. Home L. & S. Co. v. School Dist. (Kan., May 6, 1911), 115 Pac. Rep. 590. See Nixon v. Cydon Lodge, 56 Kan. 298, 43 Pac. Rep. 236.

Oklahoma. Vandenberg v. P. T. Walton L. Co., 19 Okl. 169, 92 Pac. Rep. 149.

Contractor's material-man, "subcontractor" under statute:

Kansas. Chicago L. & C. Co. v. Washington, 80 Kan. 613, 103 Pac. Rep. 80, 81.

⁶ **Washington.** See Finlay v. Tagholm (Wash., March 8, 1911), 113 Pac. Rep. 1083, s. c., 111 Pac. Rep. 782.

⁷ See "Material-men," §§ 77 et seq., this Supplement, post.

⁸ **California.** See § 1183 Code Civ. Proc., as amended May 1, 1911, Stats. and Amdts. 1911, pp. 1313 et seq.

⁹ **California.** Wood, Curtis & Co. v. El Dorado L. Co., 153 Cal. 230, 94 Pac. Rep. 877, explaining cases in § 91, foot-note 41 of Treatise. See Clark v. Brown, 141 Cal. 93, 74 Pac. Rep. 548.

See Material-man, §§ 89-91, Treatise and this Supplement.

¹⁰ **California.** Wood, Curtis & Co. v. El Dorado L. Co., 153 Cal. 230, 94 Pac. Rep. 877; Macomber v. Bigelow, 126 Cal. 9, 14, 53 Pac. Rep. 312. See § 138 Treatise and this Supplement.

¹¹ Compare Rights of Material-men, § 101, Treatise and this Supplement, post.

§ 71. **Same. Valid contract.** The subcontractor has a lien under the statute,¹² and his subcontractors and materialmen in various degrees, in most jurisdictions considered, have a lien not dependent upon whether the material or services were furnished at the order of the contractor; but the right to the lien depends upon performing the labor or furnishing the materials for the property, at the instance of the owner or his agent, actual, ostensible or statutory.¹³

When the terms and conditions of the original contract are made part of the subcontract by proper reference, the subcontractor is bound by all of the terms of the original contract;¹⁴ and when the original contractor can not recover thereon against the owner by reason of the destruction of the building before completion, the subcontractor can not recover against the contractor.¹⁵

Additional matter to foot-note 11.¹⁶

Additional matter to foot-note 12.¹⁷

¹² *California*. *Coghlan v. Quarataro* (Cal. App., March 21, 1911), 115 Pac. Rep. 664, 667.

¹³ *California*. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 461, 94 Pac. Rep. 775.

¹⁴ *Utah*. *Midgley v. Campbell B. Co.* (Utah), 112 Pac. Rep. 820.

¹⁵ *California*. *Watson v. Alta I. Co.*, 12 Cal. App. 560, 565, 108 Pac. Rep. 48 (hearing in Supreme Court denied); *Watson v. Alta I Co.*, 12 Cal. App. 566, 108 Pac. Rep. 50.

¹⁶ The contract price is the fund from which the subcontractors are entitled to receive their pay, if they have perfected their liens:

Kansas. See *Town Co. v. Morris*, 39 Kan. 377, 18 Pac. Rep. 280; *Clough v. McDonald*, 18 Kan. 114, 118; *Shellabarger v. Thayer*, 15 Kan. 619; *Fossett v. Rock-Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 835.

The subcontractor who has lost his lien by failure to give the notice or to file his statement has no right to share in the distribution and no claim against the property: *Fossett v. Rock-Island L. & Mfg. Co.*, *supra*.

¹⁷ *California*. See § 1183 Code Civ. Proc., as amended May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.: "Nor in any case, where the claimant was employed by a contractor, or subcontractor, shall the lien extend to any labor or materials not embraced within or covered by the original contract between the contractor and the owner, or any modification thereof made by or with the consent of such owner, and of which such contract, or modification thereof the claimant shall have had actual notice before the performance of such labor or the furnishing of such materials." It is further provided that the filing of such contract or modification in the office of the county recorder shall be equivalent to such notice.

§ 72. Same. Void contract.¹⁸**§ 73. Same. Personal rights.**

Additional matter to foot-note 16.¹⁹

Additional matter to foot-note 17.²⁰

Additional matter to foot-note 18.²¹

Additional matter to foot-note 19.²²

Additional matter to foot-note 20.²³

§ 73a. Same. Death of original contractor. Where the original contractor dies after levy of execution by way of

¹⁸ **California.** The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.).

See §§ 268, 269, 274, 281, 288 and 328, this Supplement, post.

¹⁹ **Oklahoma.** And the subclaimant does not waive the personal liability of the contractor who contracts with him by reason of filing a notice of lien: *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547.

²⁰ **California.** *Goldtree v. City of San Diego*, 8 Cal. App. 505, 506, 97 Pac. Rep. 216, s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

As between the contractor and his subcontractors there may be offsets, counterclaims and defenses as to which the owner may have no knowledge or concern. The subcontractor may depend upon the personal liability of the contractor and claim no lien as against the owner; but where a lien is claimed and sought to be enforced the owner is, of course, interested in the extent of the lien to be established against his property:

Kansas. *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

Oklahoma. *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547.

²¹ **Montana.** So far as the lien is concerned, the contractor has no right to apply payments to other buildings to the prejudice of the owner of the building on account of which the owner made the payment to the subcontractor: *Mills v. Olsen* (Mont., March 29, 1911), 115 Pac. Rep. 33, 36.

Oklahoma. The subcontractor has a lien, established in the same mode and to the same extent as the original contractor, but to no greater extent; and when there is no primary obligation to the original contractor, there is none to his subcontractor: *Christy v. Union O. & G. Co.* (Okl., March 21, 1911), 114 Pac. Rep. 740; *Shirley v. Union O. & G. Co.* (Okl., March 21, 1911), 114 Pac. Rep. 742.

²² **There being no privity:**

Kansas. *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004. See *Fossett v. Rock-Island L. & M. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 14 L. R. A. (N. S.), 918.

Oklahoma. *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547.

²³ **California.** As to payment of subcontractor's claimants first out of proceeds: See *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub. nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

garnishment against the owner on behalf of his claimants recovering personal judgments against the contractor, the failure of the claimants to present their claims to the administrator of the estate of the original contractor does not affect their right to reduce to possession the debt due from the owner to the original contractor.²⁴

§ 74. Same. Amount of claim. In enforcing liens of the various claimants and subclaimants, under a valid contract, or when an indirect lien is given, there must be an adjustment of the rights of the respective parties,²⁵ and the property being liable only for the value of the work done, if there be not sufficient funds to pay the subcontractor and his employees, the latter must be first paid, and the loss, if any, must be borne by the subcontractor.²⁶

Relations between contractor and subcontractor. But it has been said that there was nothing in the letter or spirit of the California lien law, as it existed before the amendment of 1911, to indicate that the laborers and material-men's liens could be affected by the obligations which existed between the contractor and his subcontractor.²⁷

Additional matter to foot-note 21.²⁸

§ 75. Same. Priorities.²⁹

²⁴ *California*. Nordstrom v. Corona City W. Co., 155 Cal. 206, 213, 100 Pac. Rep. 242.

²⁵ *California*. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

Colorado. Estey v. Halleck & Howard L. Co., 4 Colo. App. 165, 34 Pac. Rep. 1114.

Oklahoma. Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 547.

²⁶ *California*. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

Oklahoma. The subcontractor is entitled to recover on his lien an amount sufficient to cover what is due to his subclaimants: Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 547.

²⁷ *California*. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

²⁸ *California*. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

²⁹ See "Priorities," §§ 486 et seq., this Supplement, post.

§ 76. **General obligations of subcontractors.** If the subcontractor did not perform his contract with the original contractor, under the California statute as it existed before the amendment of 1911, the subcontractor's lien might have been refused.³⁰

Additional matter to foot-note 23.³¹

Additional matter to foot-note 24.³²

³⁰ California. See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 517, 97 Pac. Rep. 414, 420.

³¹ Kansas. *Fossett v. Rock-Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 832, 838, 14 L. R. A. (N. S.), 918.

³² Kansas. The owner may recoup damages against the subcontractor for breach of the contract, without regard to specific provision for damages in contract: *Wichita S. & D. Co. v. Well*, 80 Kan. 606, 103 Pac. Rep. 1002, 1005. See *Fossett v. Rock-Island L. & M. Co.*, 76 Kan. 428, 92 Pac. Rep. 832, 14 L. R. A. (N. S.), 918.

CHAPTER VI.

MATERIAL-MEN.

§ 77. **Distinction. Material-man, original contractor, and subcontractor.**¹

§ 78. **Definition of "material-man."**²
Additional matter to foot-note 1.³

§ 79. **Who are not material-men.**⁴

§ 80. **Same. Placing material in situ.**
Additional matter to foot-note 11.⁵

§ 81. **Distinction between material-man and subcontractor.**⁶

§ 82. **Circumstances under which lien for materials is given. The contract. Use of materials.**⁷

¹ **Kansas.** Contractor's material-man, "subcontractor" under the statute: *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 81.

Washington. One furnishing sashes, doors and glass for a building is a material-man and not a subcontractor; otherwise, every material-man would fall into the class of subcontractors, and such construction would nullify the plain terms of the statute: *Findlay v. Tagholm* (Wash., March 8, 1911), 113 Pac. Rep. 1083; s. c., 111 Pac. Rep. 782.

² See Statutory Agency, §§ 672 et seq., Treatise and this Supplement. **Idaho.** See *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

³ **California.** See *Loma Prieta L. Co. v. Hinton*, 12 Cal. App. 766, 768, 108 Pac. Rep. 528.

Washington. See *Gate City L. Co. v. City of Montesano* (November 25, 1910), 111 Pac. Rep. 799.

⁴ See §§ 60 and 68 this Supplement, ante.

⁵ **California.** But see *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714, where the person furnishing and placing tiling on a roof was held a subcontractor.

⁶ **California.** Compare *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714.

⁷ **The contract:**

California. Contract for delivery of material of a certain amount per month, construed calendar month: *Fairchild-Gillmore-Wilton Co. v. Southern R. Co.* (Cal.), 110 Pac. Rep. 951, 953.

Additional matter to foot-note 16.⁸

Additional matter to foot-note 17.⁹

Additional matter to foot-note 19.¹⁰

§ 83. Same. Contract for sale, or for labor.¹¹

⁸ **Kansas.** The contract for materials need not describe the lots or the building, and the material-man need not know the exact location of the same: *Smith v. Chicago L. & C. Co.* (Kan., March 11, 1911), 114 Pac. Rep. 372, 373; *Wilson v. Howell*, 48 Kan. 150, 152, 29 Pac. Rep. 151.

Nor need the material-man know the precise character of the contemplated improvement; it is enough for him to know of the original contract and to know that the materials are to go to the betterment of the estate of the owner named: *Smith v. Chicago L. & C. Co.*, supra.

The language employed in *Sturges v. Green*, 27 Kan. 235, and *Wilson v. Howell*, 48 Kan. 150, 152, 29 Pac. Rep. 151, means that the statute is satisfied if the understanding be that the material is purchased for an improvement for a particular person or upon a particular contract: *Smith v. Chicago L. & C. Co.*, supra.

New Mexico. Contract in writing. In the absence of an express statutory requirement, the contract for the sale of material need not be in writing, nor if in writing need it show that the material is sold to be used in the construction of the particular building upon which the lien is sought to be impressed. These facts may be shown by parol evidence, if it does not dispute or alter the terms of any written contract: *Stearns-Roger Mfg. Co. v. Aztec M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710. The Statute of Frauds must, of course, be followed.

⁹ **Sold to be used:**

California. See *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

Colorado. Evidence of delivery and use held sufficient: See *Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573. See *Rice v. Rhone* (Colo., May 2, 1910), 111 Pac. Rep. 585.

Idaho. See *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Kansas. But see *Smith v. Chicago L. & C. Co.* (Kan., March 11, 1911), 114 Pac. Rep. 372, 373, 374.

New Mexico. See contra, *Stearns-Roger Mfg. Co. v. Aztec M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710.

Washington. *Pacific L. & T. Co. v. Dailey* (Wash., November 22, 1910), 111 Pac. Rep. 869, 870.

¹⁰ **Sale of material in other state:**

New Mexico: *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 709.

Contra: *Birmingham I. Foundry v. Glenn Cove S. Mfg. Co.*, 78 N. Y. 30, under a more restrictive statute. Strike this case from foot-note 19 in Treatise.

¹¹ **California.** See *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714.

§ 84. Same. Formalities. Recording contract.¹²

§ 85. Same. As affected by original contract.

Additional matter to foot-note 21.¹³

Additional matter to foot-note 22.¹⁴

§ 86. Same. Other general essentials.¹⁵

§ 87. Same. Nature and manner of use of materials.¹⁶

§ 88. Same. Definition of "furnished."¹⁷

¹² See § 82 Treatise and this Supplement, ante.

Kansas. See *Smith v. Chicago L. & C. Co.* (Kan., March 11, 1911), 114 Pac. Rep. 372, 373, 374.

¹³ **California.** *Howe v. Schmidt* (Cal.), 90 Pac. Rep. 1056.

Kansas. Subcontractor under the statute (Gen. St. 1909, § 6246) must contract with reference to the original contract, that is, he must have knowledge of such original contract and that the material to be furnished is going to the betterment of some particular estate: *Smith v. Chicago L. & C. Co.* (Kan., March 11, 1911), 114 Pac. Rep. 372, 374; *Manufacturing Co. v. Best*, 63 Kan. 187, 192, 65 Pac. Rep. 239, 241.

¹⁴ **California.** See § 71 this Supplement: § 1183 Code Civ. Proc., as amended May 1, 1911, Stats. & Admts. 1911, pp. 1313 et seq.

Idaho. The contractor's agency extends only to the purchase of material reasonably necessary for the building of the structure in accordance with the original contract and for the reasonable value of such materials only as are ordinarily sufficient to properly construct the building in accordance with the plans and specifications: *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Washington. See *Rieflin v. Grafton* (Wash., June 1, 1911), 115 Pac. Rep. 851, 853.

¹⁵ **New Mexico.** Use of materials. *Neher v. Viviani* (N. M., August 10, 1910), 110 Pac. Rep. 695, 698.

¹⁶ Materials must be actually used:

California. See *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

Colorado. See *Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573.

Idaho. *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 26.

Kansas. See *Smith v. Chicago L. & C. Co.* (Kan., March 11, 1911), 114 Pac. Rep. 372, 373, 374.

Nebraska. See *Foster v. Dohle*, 17 Neb. 631, 24 N. W. Rep. 208; *Weir v. Barnes*, 38 Neb. 875, 57 N. W. Rep. 750.

New Mexico. *Neher v. Viviani* (N. M., August 10, 1910), 110 Pac. Rep. 695, 698.

Washington. *Gate City L. Co. v. City of Montesano* (Wash., November 25, 1910), 111 Pac. Rep. 799, 87 Pac. Rep. 485.

¹⁷ **Washington.** Place of delivery of material: See *Chicago L. & C. Co. v. McCann*, 48 Wash. 174, 93 Pac. Rep. 216.

Additional matter to foot-note 27.¹⁸

§ 89. Same. Materials, how used.¹⁹

Additional matter to foot-note 28.²⁰

Additional matter to foot-note 29.²¹

Additional matter to foot-note 30.²²

18 Definitions of "furnished":

New Mexico. Compare *Smith v. Hicks*, 14 N. M. 560, 98 Pac. Rep. 138, 140.

Oregon. Compare *Brown v. Sharkey* (Oreg., April 25, 1911), 115 Pac. Rep. 156.

19 California. Horses and harness let to a contractor at a stipulated rate per month, under control of the teamster hired and paid by original contractor; no lien therefor: *Wood, Curtis & Co. v. El Dorado L. Co.*, 153 Cal. 230, 94 Pac. Rep. 877.

Oklahoma. Material for paving streets: See *City of Oklahoma v. Shields*, 22 Okl. 265, 100 Pac. Rep. 559.

20 Washington. See *Gilbert-Hunt Co. v. Parry* (Wash.), 110 Pac. Rep. 541, 543; *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 871.

Wisconsin. See *McAuliff v. Jorgenson*, 107 Wis. 132, 82 N. W. Rep. 706.

21 Lien given, material in furtherance of work:

Power and electricity:

California. Power: See § 1183 Code Civ. Proc., as amended May 1, 1911, Stats. & Amdts. 1911, pp. 1813 et seq., allowing lien.

Montana. See *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

Oregon. Electricity for light and power, "supplies" for mine within meaning of L. O. L. § 7444, for which lien is given; *Grant's Pass B. & T. Co. v. Enterprise M. Co.* (Oreg., March 7, 1911), 113 Pac. Rep. 859. See *Rowen v. Alladio*, 51 Oreg. 121, 93 Pac. Rep. 929; *Scannevin v. Consolidated M. W. Co.*, 25 R. I. 318, 55 Atl. Rep. 754.

Washington. Computing amount due for power; wattmeter-voltages: See *Seattle R. & S. Ry. Co. v. Seattle-Tacoma P. Co.* (Wash., June 23, 1911), 116 Pac. Rep. 289, 292.

Camp equipments; no lien under § 1, c. 24, p. 32, Laws 1893, amended by c. 116, p. 229, Laws 1905; *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766.

22 Without statutory allowance tools and appliances not lienable:

Idaho. Allowable: *Naylor v. Lewiston & S. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, 577, s. c., 95 Pac. Rep. 827.

Indiana. See *Potter Mfg. Co. v. Myer & Co.*, 171 Ind. 513, 86 N. E. Rep. 837, 131 Am. St. Rep. 287.

Maryland. See *Basshor v. Baltimore & O. R. Co.*, 65 Md. 99.

Missouri. See *Meistrel v. Reach*, 56 Mo. App. 243.

Oregon. See *Allen v. Elwert*, 29 Oreg. 428, 44 Pac. Rep. 823.

Washington. *Gilbert-Hunt Co. v. Parry* (Wash.), 110 Pac. Rep. 541, 543 (many items specifically set forth in this case); *Hall v. Cowen*, 51 Wash. 295, 98 Pac. Rep. 670 (scrapers); *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 871, 102 Pac. Rep. 766. See *Vendome T. B. Co. v. Schettler*, 2 Wash. St. 457, 27 Pac. Rep. 76. 706; *Rinzer v. Stumpf*, 116 Wis. 287, 93 N. W. Rep. 36.

Additional matter to foot-note 31.²³

Additional matter to foot-note 32.²⁴

§ 90. Same. Lien, when allowed. Package.

Additional matter to foot-note 39.²⁵

§ 91. Same. Carriage charges. Building as material.²⁶

Additional matter to foot-note 40.²⁷

Additional matter to foot-note 41.²⁸

Additional matter to foot-note 42.²⁹

²³ See "Supplies" post, § 101, this Supplement.

California. See § 1183 as amended, Stats. & Amdts. 1911, pp. 1313 et seq., as to power, and see authorities to foot-note 29 of Treatise ante, this section.

Oregon. Provisions furnished for men: See *Durkheimer v. Copperopolis* (Oreg., Nov. 15, 1909), 104 Pac. Rep. 895, 896.

Washington. See *Tsutakawa v. Kumamoto*, 53 Wash., 231, 101 Pac. Rep. 869, 871, 102 Pac. Rep. 766.

²⁴ **Colorado.** *Hughes v. Kershow*, 42 Colo. 210, 93 Pac. Rep. 1116.

Washington. See *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 871, 102 Pac. Rep. 766. But otherwise, if he deliver money to the owner for the purpose of paying for material and the transaction is in its nature the sale of material; and where one who obtains materials from his employer, a manufacturer, and the same is charged to his wages, and such material is furnished for use in the building, he is a material-man and is entitled to a lien: *Poptella v. Zolawenski*, 51 Wash. 39, 97 Pac. Rep. 972.

²⁵ **Powder:**

California. Definition of "giant powder," "nitroglycerine," see *People v. Swalle*, 12 Cal. App. 192, 107 Pac. Rep. 134.

Colorado. Powder, fuse and caps: See *Barnes v. Colorado Springs C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573.

Kansas. Law relating to sale and delivery of powder at mines, constitutional: *Ex parte Williams*, 79 Kan. 212, 98 Pac. Rep. 777.

²⁶ **California.** Cells in jail; "furnishings": See *Sarver v. Los Angeles County*, 156 Cal. 187, 103 Pac. Rep. 917. See *Pauly J. B. & Mfg. Co. v. Commissioners*, 68 Fed. Rep. 171. Otherwise, when part of jail proper: *Sarver v. Los Angeles County*, supra; *Estle v. Leary*, 114 Cal. 238, 46 Pac. Rep. 1.

Colorado. Building as material: Compare *Hughes v. Kershow*, 42 Colo. 210, 93 Pac. Rep. 1116.

²⁷ **California.** *Lucas v. Gobbl*, 10 Cal. App. 648, 653, 103 Pac. Rep. 157; *Wood, Curtis & Co. v. El Dorado L. Co.*, 153 Cal. 230, 94 Pac. Rep. 887.

Washington. See *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766; *Gilbert-Hunt Co. v. Parry* (Wash.), 110 Pac. Rep. 541, 542.

²⁸ **Oregon.** Definition of "Team": *Krebs Hop Co. v. Taylor*, 97 Pac. Rep. 44, 45 (replevin).

²⁹ **California.** Compare *Barber A. P. P. Co. v. Santa Barbara I. Co.*, 110 Pac. Rep. 463, 464.

§ 92. Same. Nature of the work on the property for which the materials are furnished. The work must be upon real property and not merely upon personal property.³⁰

§ 93. Same. Alteration, construction, addition to, repair.³¹

§ 94. Same. Extent of alteration or repair.³²

§ 95. Same. Fixtures. There is no mechanic's lien on merely personal property.³³

Additional matter to foot-note 50.³⁴

§ 96. Same. In mining claims and mines.³⁵

§ 97. Same. Street-work, grading, etc.³⁶

³⁰ **Oklahoma.** Keel v. Ingersoll (Okla., September 13, 1910), 111 Pac. Rep. 214.

Oregon. See Rowen v. Alladio, 51 Oreg. 121, 93 Pac. Rep. 929. See § 95, additional matter to note 50 of text, this Supplement, post.

³¹ **Oregon.** See Rowen v. Alladio, 51 Oreg., 121, 93 Pac. Rep. 929.

Washington. See Stetson & Post L. Co. v. W. & J. Sloane Co. (Wash., December 12, 1910), 112 Pac. Rep. 248, 249.

³² **Washington.** See Stetson & Post L. Co. v. W. & J. Sloane Co. (Wash., December 12, 1910), 112 Pac. Rep. 248, 249.

³³ **Federal.** Armstrong Cork Co. v. Merchant's R. Co. (C. C. A.), 184 Fed. Rep. 199, 207; s. c. (C. C. Mo.), 171 Fed. Rep. 778.

Oklahoma. Keel v. Ingersoll (Okla., September 13, 1910), 110 Pac. Rep. 214.

Oregon. See Rowen v. Alladio, 51 Oreg. 121, 93 Pac. Rep. 929. See § 92 and note this Supplement, ante.

³⁴ **Washington.** American R. Co. v. Pendleton (Wash., February 2, 1911), 112 Pac. Rep. 1117.

³⁵ **Fixture in connection with mine:**

California. See Conde v. Sweeney (Cal. App., August 4, 1911), 110 Pac. Rep. 973, 116 Pac. Rep. 319.

Nevada. See Arnold v. Goldfield T. C. M. Co. (Nev., July 1, 1910), 109 Pac. Rep. 718.

Utah. See Park City M. Co. v. Comstock S. M. Co. (Utah, June 12, 1909), 103 Pac. Rep. 254, 259.

³⁶ **As to sidewalks:**

Idaho. See Shaw v. Johnston, 17 Idaho 676, 107 Pac. Rep. 399.

Washington. See Hall v. Cowen, 51 Wash. 295, 98 Pac. Rep. 670.

§ 98. Same. Nature of property for which material must be furnished. Generally.³⁷

§ 99. Same. Mines and mining claims.³⁸

§ 100. Same. Lien allowed.

Additional matter to foot-note 57.³⁹

§ 101. General rights of material-men.⁴⁰ There is no privity between the owner and the contractor's material-men.⁴¹ It has been said in California that subcontractor's material-men's liens are not affected by the obligations which exist between the contractor and his subcontractor.⁴²

The right of the subcontractor's material-man to a lien against the property, or the unpaid portion of the contract price under a valid contract, does not depend upon the material being ordered by the contractor, but only upon the furnishing of the material and its use in the structure, whether at the instance of the owner, or of his agent, actual, ostensible or statutory.⁴³ It is not affected by the failure

³⁷ See § 87, this Supplement, ante.

³⁸ See § 1183, Code Civ. Proc., as amended May 1, 1911 (Stats. and Amdts. 1911, pp. 1313, et seq.).

³⁹ *Oregon*. See *Escott v. Crescent C. & N. Co.* (Oreg., January 25, 1910), 106 Pac. Rep. 452, 455.

⁴⁰ **Failure to pay occupation license by material-man:** See *Fossett v. Rock-Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833; *Prather v. People*, 85 Ill. 36.

Damages for delay in transportation: See *St. Louis & S. F. R. Co. v. Gaba*, 78 Kan. 432, 97 Pac. Rep. 435; *Guetschow Bros. Co. v. Andrews*, 92 Wis. 214, 66 N. W. Rep. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909.

Damages for delay in delivery of material: See *Standard L. Co. v. Miller & Vidor L. Co.*, 21 Okl. 617, 96 Pac. Rep. 761, 765.

Waiver of right to rescind for non-payment of installment, by granting time: See *Fairchild-Gilmore-Wilton Co. v. Southern R. Co.*, 158 Cal. 264, 110 Pac. Rep. 951, 955.

⁴¹ *California*. *San Pedro L. Co. v. Schroeder*, 156 Cal. 158, 161, 103 Pac. Rep. 888.

Idaho. See *Larson v. Carter*, 14 Idaho 511, 94 Pac. Rep. 825, 827.

Kansas. See *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 81.

Washington. Privity with contractor and his wife, see *Rasmussen v. Liming*, 50 Wash. 184, 96 Pac. Rep. 1044.

⁴² *California*. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

⁴³ *California*. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

of the original contractor to protect himself from misappropriation of funds by his subcontractor.⁴⁴

Additional matter to foot-note 60.⁴⁵

Additional matter to foot-note 63.⁴⁶

§ 101a. **Same. Extent of lien.** The contractor's material-man is only entitled to be paid by the owner of the building when there is something owing and unpaid from the owner to the original contractor, under a valid statutory original contract.⁴⁷

Subcontractors' material-men are paid out of the fund before their subcontractors; and if the fund is not sufficient, the loss, if any, must be borne by such subcontractors.⁴⁸

§ 102. General obligations of material-men.

Additional matter to foot-note 67.⁴⁹

⁴⁴ California. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

Kansas. The statute does not authorize a lien in favor of the subcontractor's material-man ("Subcontractor under a subcontractor," according to the decision): Home L. & S. Co. v. School Dist. (Kan., May 6, 1911), 115 Pac. Rep. 590; Nixon v. Cydon Lodge, 58 Kan. 298, 43 Pac. Rep. 236.

⁴⁵ Personal judgment by contractor's material-men against contractor:

California. See Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 524-526, 97 Pac. Rep. 414, 420.

Colorado. See Barnes v. Colorado Springs & C. C. D. Ry. Co., 42 Colo. 461, 94 Pac. Rep. 570, 573.

Washington. Rasmussen v. Lirning, 50 Wash. 184, 96 Pac. Rep. 1004.

⁴⁶ "Supplies" broader term than "Materials":

Michigan. Lawson v. Higgins, 1 Mich. 225.

Washington. Tsutakawa v. Kumamoto, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766.

"Provisions and supplies":

Washington. Tsutakawa v. Kumamoto, supra., decided under an amended act, and explaining Laidlaw v. Portland R. Co., 42 Wash. 292, 84 Pac. Rep. 855.

⁴⁷ California. McCue v. Jackman, 7 Cal. App. 703, 95 Pac. Rep. 673 (before amendment of statute in 1911).

See § 454 Treatise, and additional matter to foot-note 46 of Treatise, this Supplement, post.

⁴⁸ California. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

⁴⁹ Damages for breach of contract to deliver material: See Fairchild-Gilmore-Wilton Co. v. Southern R. Co., 110 Pac. Rep. 951, 954.

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§ 103. Same. Knowledge of terms of original contract.⁵⁰

⁵⁰ See § 71, Treatise and this Supplement, ante.

California. See amendment of May 1, 1911, to § 1183, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq.

Idaho. Compare Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24, 26.

Washington. Compare Riefkin v. Grafton (Wash., June 1, 1911), 115 Pac. Rep. 851, 853.

CHAPTER VII.

PERSONS PERFORMING LABOR.

§ 104. Scope of chapter.¹§ 105. Statutory provision.²Additional matter to foot-note 2.³§ 106. Constitutional provision.⁴

§ 107. Laborer distinguished from contractor, subcontractor and material-man.

Additional matter to foot-note 5.⁵§ 108. Laborer does not create intermediate lien-holders.⁶

§ 109. Personal services.

Additional matter to foot-note 7.⁷

§ 110. Definitions. Various kinds of laborers.

Additional matter to foot-note 8.⁸

¹ See generally, "Labor for which lien is given," §§ 130 et seq., this Supplement, post.

² "Labor"; *Sunday law*: See *City of Topeka v. Crawford*, 78 Kan. 583, 96 Pac. Rep. 862.

³ *California*. See § 1183, Code of Civ. Proc., as amended May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq. Employing unnaturalized aliens under Good Roads Law, Stats. & Amdts. 1907, p. 636, see *City S. I. Co. v. Kroh*, 158 Cal. 308, 110 Pac. Rep. 933, 941.

⁴ See §§ 28-41, this Supplement, ante.

⁵ *Oklahoma*. "Person doing contract work," see *Ex parte Unger*, 22 Okl., 755, 98 Pac. Rep. 999.

Subcontractor's artisans and laborers have liens: *Vandenberg v. P. T. Walton L. Co.*, 19 Okl., 169, 92 Pac. Rep. 149.

⁶ See "Original Contractor," §§ 45-65; "Subcontractor," §§ 66, 76, this Supplement, ante.

⁷ *New Mexico*. See *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710.

Oregon. See *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, following *Smallhouse v. Kentucky & M. G. & S. M. Co.*, 2 Mont. 443. See *Washburn v. Intermountain M. Co.* (Oreg., June 28, 1910), 109 Pac. Rep. 382, 386.

⁸ Definitions of "artisan," "laborer," "other person," "workman,"

§ 111. Nature of labor for which lien is given.

Additional matter to foot-note 9.⁹

§ 112. General rights of laborers. Similar to those of material-men. Laborers are not entitled to a personal judgment against the original contractor, in the absence of privity.¹⁰ The subcontractor's laborers may file a claim of lien notwithstanding the fact that their subcontractor may have filed a claim of lien covering their claims.¹¹ It is said that the subcontractor's laborers are not affected by the obligations which exist between the subcontractor and the original contractor.¹²

Additional matter to foot-note 10.^{12a}

§ 113. Same. Priorities.

Additional matter to foot-note 11.¹³

"artificer," "mechanic," "craftsman": State v. City of Ottawa (Kan., February 11, 1911), 113 Pac. Rep. 391, 393.

Washington. Blacksmith, wagon-maker, machinist, boiler-maker; plumber not machinist: Modern P. & H. Co. v. American S. F. Co. (Wash., January 28, 1910), 106 Pac. Rep. 628.

⁹ In a mine:

California. In development or working by subtractive process; watchman, roustabout, well-cleaner: Donaldson v. Orchard, 6 Cal. App. 641, 645, 92 Pac. Rep. 1046.

Oregon. See Escott v. Crescent C. & N. Co. (Oreg., January 25, 1910), 106 Pac. Rep. 452, 455.

Cooking for employers, no lien: Durkheimer v. Copperopolis C. Co. (Oreg., November 15, 1909), 104 Pac. Rep. 895, 898.

Washington. Foreman; no lien: Washburn v. Intermountain M. Co. (Oreg., June 28, 1910), 109 Pac. Rep. 382, 385, citing Oregon case, *supra*.

Superintendent of building, lien allowed: MacDonald v. O'Shea, 58 Wash. 169, 108 Pac. Rep. 436, 439.

Lathing, plastering plumbing, lien allowed: Coghlan v. Quaratararo (Cal. App., March 21, 1911), 115 Pac. Rep. 664.

Logging: See Lane v. Lane-Potter L. Co., 40 Mont. 541, 107 Pac. Rep. 898.

¹⁰ California. Goldtree v. City of San Diego, 8 Cal. App. 505, 506, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

¹¹ California. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

¹² California. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

^{12a} California. Regulating hours of employment in mines and smelters, under Stats. & Amtds. 1909, p. 279, c. 181, constitutional: Ex parte Martin, 106 Pac. Rep. 235.

¹³ California. See Barrett-Hicks Co. v. Glas (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

§ 114. Same. Material-man's laborers.
Additional matter to foot-note 12.¹⁴

§ 115. Same. Death of employer.
Additional matter to foot-note 14.¹⁵

§ 116. Same. Public work.
Additional matter to foot-note 15.¹⁶

§ 117. General obligations of laborers.
Additional matter to foot-note 16.¹⁷

§ 118. Same. Death of employer.
Additional matter to foot-note 17.¹⁸

¹⁴ California. See Wood, Curtis & Co. v. El Dorado L. Co., 153 Cal. 230, 94 Pac. Rep. 877.

¹⁵ "Employer of labor," in by-laws of Labor Union, see J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. Rep. 1027.

See § 118, Treatise, and this Supplement.

¹⁶ See § 626, this Supplement, post.

¹⁷ See §§ 102 and 103, this Supplement, ante.

¹⁸ See § 920, this Supplement, post.

CHAPTER VIII.

ARCHITECTS.

§ 119. **Architects. Their regulation.** Architecture is the art of building according to certain determined rules.¹

Municipal ordinances. The architect must have knowledge of the building laws, ordinances and regulations at the place where the structure is to be erected; otherwise, he will be held liable to the owner, if, through ignorance of the same, the employer is damaged.²

Additional matter to foot-note 2.³

¹ **Idaho.** *Nave v. McGrane* (Idaho, December 20, 1910), 113 Pac. Rep. 82, 84.

Louisiana. *Louisiana M. Co. v. Le Sassier*, 52 La. Ann. 2070, 28 South. Rep. 217.

² *Nave v. McGrane* (Idaho, December 20, 1910), 113 Pac. Rep. 82, 88 (an exhaustive decision as to the liability of architects, viewed from many points); *Straus v. Buchman*, 96 App. Div. 270, 89 N. Y. Supp. 226; 1 Encyc. of Architecture, pp. 24-25, 37. See *Hubert v. Aitken*, 15 Daly 237, 2 N. Y. Supp. 711.

Beams resting on stud-partitions, contrary to statute: See *Straus v. Buchman*, *supra*.

Sanitary ventilation: See *Hubert v. Aitken*, *supra*.

Compliance with ordinance: See *Nave v. McGrane*, *supra*, pp. 87, 88.

Regulations concerning excavations in streets: See *Ex parte Wilcox* (Cal. App., August 24, 1910), 111 Pac. Rep. 374.

Stables; building ordinance of San Francisco, § 320, construed, and provision with reference to cost over \$1000, considered; pleadings: *Coon v. Board of Public Works*, 7 Cal. App. 760, 95 Pac. Rep. 913.

Building ordinance, relating to permits for constructing stables, held unreasonable: See *Coon v. Board of Public Works*, *supra*.

Ordinance taxing "persons doing contract work," held invalid: *Ex parte Unger*, 22 Okl. 755, 98 Pac. Rep. 999. See *State v. McNally*, 45 La. Ann. 44, 12 South. Rep. 117.

Building ordinance in chartered cities yields to general law, when conflicting: *May v. Craig*, 13 Cal. App. 368, 109 Pac. Rep. 842. See *In re Hoffman*, 155 Cal. 117, 99 Pac. Rep. 517.

Fire limits, ordinance to prevent construction, alteration and enlargement of frame buildings within: *Morton v. Wessinger* (Oreg., February 14, 1911), 113 Pac. Rep. 7.

3 Cases in which acts regulating and licensing various trades, businesses and professions have been upheld as constitutional:

Barbers: *State v. Walker*, 48 Wash. 8, 92 Pac. Rep. 775; *State v. Sharpless*, 31 Wash. 191, 71 Pac. Rep. 737, 96 Am. St. Rep. 893.

§ 120. Statutory provision.⁴Additional matter to foot-note 3.⁵**§ 121. Definition of architect.⁶**Additional matter to foot-note 4.⁷**§ 122. Contract of unlicensed architect.**Additional matter to foot-note 5.⁸

§ 123. Rights of architects. Where the agreement between the owner and architect is for the construction of a building not to exceed a certain cost, and the architect plainly fails to prepare plans which come within the limitations of the cost of construction, the architect can not recover upon the contract, nor for the reasonable value of his services for drafting plans and specifications, even if the owner fails to return them, without using them.⁹

A payment on account to the architect does not amount to an acceptance of the plans, when such payment is made before it is demonstrated by the bids that the plans require

Dentistry: *State v. Thompson*, 48 Wash. 683, 94 Pac. Rep. 667; *In re Thompson*, 36 Wash. 377, 78 Pac. Rep. 879. See *State ex rel. Smith v. Board of Dental Exm'rs*, 31 Wash. 492, 72 Pac. Rep. 110.

Canning salmon: See *State v. Hume*, 52 Oreg. 1, 95 Pac. Rep. 808.

Medicine and surgery: *State v. Carey*, 4 Wash. 424, 30 Pac. Rep. 729. See *Ex parte Bohanon* (Cal. App., October 5, 1910), 111 Pac. Rep. 1039.

Cases holding acts unconstitutional for various reasons:

Horse-shoeing: *Re Aubrey*, 36 Wash. 308, 78 Pac. Rep. 900, 104 Am. St. Rep. 952.

Plumbing: *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. Rep. 851, 114 Am. St. Rep. 114, 5 L. R. A. (N. S.) 674.

⁴ **California.** See An act to regulate the building and occupancy of tenement houses, Stats. & Amdts. 1911, c. 432, pp. 860 et seq., repealing Act approved April 16, 1909, Stats. & Amdts. 1909, p. 948.

⁵ **California.** See § 1183, Code Civ. Proc., as amended May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.

⁶ See *Nave v. McGrane* (Idaho, December 20, 1910), 93 Pac. Rep. 82, 85. Plans and specifications, see § 1290, this Supplement, post.

⁷ **An architect is an expert in carpentry, in cements, in mortar, in the strength of materials, in the art of constructing the walls, the floors, the staircases, the roofs:** *Hubert v. Aitken*, 15 Daly 237, 2 N. Y. Supp. 711; *Nave v. McGrane*, *supra*, p. 88.

⁸ Compare contract of unlicensed material-man, § 119, this Supplement, ante.

⁹ **Washington.** *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. Rep. 8. See *Nave v. McGrane* (Idaho, December 20, 1910), 113 Pac. Rep. 82, 83.

such a larger cost of construction; and it seems that the owner may recover back any payment so made to the architect.¹⁰

§ 124. Right to lien.

Additional matter to foot-note 10.¹¹

§ 125. Powers of architect. It is not in the power of the architect or engineer to change or waive terms of the contract between the owner and contractor,¹² unless such power is given by the contract itself.¹³ Power to oversee the work or reject materials does not necessarily give authority to accept the completed structure, or any part of it.¹⁴ Under the ordinary provisions of construction contracts, and at least in the absence of express authority, the chief engineer has no authority to determine questions relating to the meaning and interpretation of the contract itself; but his powers are

¹⁰ *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. Rep. 8. See *Nave v. McGrane* (Idaho, December 20, 1910), 113 Pac. Rep. 82, 83.

¹¹ *California*. See Stats. & Amdts. 1911, pp. 1313 et seq.

New Mexico. See *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710.

Oregon. See *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, explaining *Willamette Falls T. & M. Co. v. Remick*, 1 Oreg. 169, and *Cullins v. Flagstaff S. M. Co.*, 2 Utah 219, affirmed, 104 U. S. 176, 26 L. ed. 704.

California. *City S. I. Co. v. Kroh*, 158 Cal. 308, 110 Pac. Rep. 933, 933.

Colorado. *Town of Sterling v. Hurd*, 44 Colo. 436, 98 Pac. Rep. 174, 176.

¹² *Federal*. See *United States v. Walsh*, 115 Fed. Rep. 697, 52 C. C. A. 419.

Georgia. See *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. Rep. 983.

Illinois. See *McAvoy v. Long*, 13 Ill. 147; *County of Cook v. Harma*, 108 Ill. 151.

New York. See *Burke v. Mayor, etc., of City of New York*, 7 App. Div. 128, 40 N. Y. Supp. 82.

Oregon. *Williams v. Mount Hood Ry. & P. Co.* (Oreg., August 3, 1910), 110 Pac. Rep. 490, 492; s. c., 111 Pac. Rep. 17.

Pennsylvania. See *Drhew v. Altoona*, 121 Pa. 401, 420, 15 Atl. Rep. 636.

Texas. See *G. H. & S. A. Ry. Co. v. Henry*, 65 Tex. 685.

As to withholding certificates arbitrarily, see § 129, post, this Supplement.

¹³ *Colorado*. *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 919.

¹⁴ *Colorado*. *Town of Sterling v. Hurd*, 44 Colo. 436, 98 Pac. Rep. 174, 177. See *Mercantile Trust Co. v. Hensley*, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. ed. 816.

rather limited to determinations of estimates, classifications and character of work provided by the contract to be done and performed.¹⁵

The architect has no power to accept bids or enter into a contract with the contractor, unless such power is given to him by the owner; and the mere fact that he draws plans and specifications and is authorized to have bids submitted to ascertain whether the cost of construction will exceed a certain figure does not give the architect authority to enter into such contract, particularly where the owner refuses to construct by reason of the bids exceeding that figure.¹⁶

§ 126. Relation between owner and architect.¹⁷ While the relation between the owner and the architect is not confidential in the sense that communications between them are privileged, yet there is a position of trust occupied by the architect, which he may easily take advantage of, if he so desires. The owner does not know the rules of architecture; he therefore employs the architect who makes the plans in accordance with them.¹⁸ The owner may not know all of the facts necessary to be imparted to the architect to enable him to prepare the proper plans and specifications, and it is the duty of the architect to obtain from the owner just that information and the facts he requires in order to prepare the proper plans and specifications. Hence, if the plans do not fulfill the owner's intentions because the architect did not have sufficient information, it is the fault of the architect in not obtaining such information, as he should know better than the owner just what facts and information are needed to intelligently draw the required plans and specifications. Much of the trouble between contractors and owners arises

¹⁵ **Idaho.** Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 795, 92 Pac. Rep. 980.

¹⁶ **Oregon.** Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

¹⁷ **Architect constructing building upon a percentage basis, as common law agent of owner and not as independent contractor, see** Loma Prieta L. Co. v. Hinton, 12 Cal. App. 766, 108 Pac. Rep. 528.

¹⁸ **Nave v. McGrane** (Idaho, December 20, 1910), 113 Pac. Rep. 82, 84; **Louisiana M. Co. v. Le Sassier**, 52 La. Ann. 2070, 28 South. Rep. 217.

from the fact that the plans and specifications are not definite and certain. As a rule, the owner knows nothing about the details of the contract that the contractor ought to sign in order that the owner may be protected, as this is usually left almost wholly to the architect.¹⁹

Dual relation of architect. While the architect or engineer may stand in the relation of umpire in some of his aspects, in other aspects he may stand in the relation of the agent for the owner; and the latter is so when the owner consults him to determine the character of the material which should go into the building, and in this respect he is the owner's agent.²⁰

§ 127. Same. Agent of owner. The architect employed by the owner upon a percentage basis, the architect drawing the plans and specifications and hiring a superintendent to take charge of the hiring of the labor and purchasing of material and letting subcontracts, the owner to pay and advance from time to time money needed to pay therefor, is the common law agent of the owner.²¹

§ 128. Architect as subcontractor.²²

§ 129. Obligations of Architect. Duty to inspect work. It is the duty of the architect or engineer to inspect the work, as it proceeds, when under the contract he is made arbiter or umpire. But the contractor has no cause for complaint when the absence of the architect from the work was caused by the fault of the contractor, and as to him such absence is excusable.²³

¹⁹ *Nave v. McGrane* (Idaho, December 20, 1910), 113 Pac. Rep. 82, 85.

²⁰ *Washington. Camp v. Neufelder*, 49 Wash. 426, 95 Pac. Rep. 640. See § 127, this Supplement, post.

²¹ *California. Loma Prieta L. Co. v. Hinton*, 12 Cal. App. 766, 768, 108 Pac. Rep. 528.

Washington. Architect, as owner's agent, giving notice to contractor's surety of breach of contract, see *Martin v. Empire State S. Co.*, 53 Wash. 290, 101 Pac. Rep. 876.

²² See *Architect as contractor*, this Supplement, § 126, ante.

²³ *Colorado. Town of Sterling v. Hurd*, 44 Colo. 436, 98 Pac. Rep. 174, 176. See *Duty as arbiter*, §§ 129a et seq., this Supplement, post.

§ 129a. Same. Duty to act fairly and honestly as arbiter or umpire. Stipulated certificates or approval of work by the architect or engineer should not be withheld arbitrarily,²⁴ nor unreasonably,²⁵ nor because of bias against either party.²⁶

In making his estimates or giving his certificates, the architect or engineer must act honestly,²⁷ and not refuse to make inquiries nor neglect to inform himself from proper sources as to the facts in dispute; nor should he act wholly on information received from other persons.²⁸ He should inform himself as to the condition of the matters or works he is to determine upon,²⁹ and the nature of the work or classification to which it applies.³⁰ He should not fail to make a personal examination and exercise his independent judgment,³¹ and he should not act in such manner that there may be imputed to him actual or constructive fraud.³²

²⁴ **Idaho.** Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 785, 92 Pac. Rep. 980.

Montana. Piper v. Murray (Mont., April 22, 1911), 115 Pac. Rep. 669, 671.

Utah. Midgley v. Campbell Bldg. Co. (Utah, January 11, 1911), 112 Pac. Rep. 820.

Washington. Sweatt v. Bonne (Wash., September 2, 1910), 110 Pac. Rep. 617; Camp v. Neufelder, 49 Wash. 426, 95 Pac. Rep. 640.

²⁵ **California.** Copley v. Durand, 153 Cal. 278, 281, 95 Pac. Rep. 38.

²⁶ **Idaho.** Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 795, 796, 92 Pac. Rep. 980.

²⁷ **Idaho.** Nelson Bennett Co. v. Twin Falls L. & W. Co., *supra*.

Kentucky. See Cummings v. Bradford, 22 S. W. Rep. 548.

Washington. Pinickneff v. Johnson, 54 Wash. 156, 102 Pac. Rep. 1047; Camp v. Neufelder, 49 Wash. 426, 95 Pac. Rep. 640. See McKivor v. Savage (Wash., September 19, 1910), 110 Pac. Rep. 811, 812.

²⁸ **Idaho.** Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 795, 92 Pac. Rep. 980.

Utah. Midgley v. Campbell Bldg. Co. (Utah, January 4, 1911), 112 Pac. Rep. 820.

²⁹ **Idaho.** Nelson Bennett Co. v. Twin Falls L. & W. Co., *supra*.

³⁰ **Idaho.** Nelson Bennett Co. v. Twin Falls L. & W. Co., *supra*.

Washington. Pinickneff v. Johnson, 54 Wash. 156, 102 Pac. Rep. 1047.

³¹ **Utah.** Midgley v. Campbell Bldg. Co. (Utah, January 4, 1911), 112 Pac. Rep. 820.

Washington. Ilse v. Aetna I. Co., 55 Wash. 487, 104 Pac. Rep. 787; Camp v. Neufelder, 49 Wash. 426, 95 Pac. Rep. 640. See Van Hook v. Burns, 10 Wash. 22, 38 Pac. Rep. 763; McDonald v. Lewis, 18 Wash. 300, 51 Pac. Rep. 387; Long v. Pierce County, 22 Wash. 354, 61 Pac. Rep. 142.

³² **California.** See City S. I. Co. v. Marysville, 155 Cal. 419, 431, 432, 101 Pac. Rep. 308.

In extensive works, the chief engineer can not measure every yard of earth and material cut and classify the same personally, and he must in some measure rely upon information derived from other sources;³³ but in every case the decision of the chief engineer, as arbiter under the contract, must be the result of a fair and deliberate judgment; and as his functions in this regard are of a quasi-judicial character, they can not be delegated to any one else; but he must hear and discover the facts and take such steps as will enable him to get in possession of the facts in controversy in order to render such judgment.³⁴ For him to rely entirely upon the statements and judgment of a subordinate, whom he knows or has reason to believe is prejudiced against the contractor is a species of fraud which the law will not tolerate.³⁵

Colorado. *Town of Sterling v. Hurd*, 44 Colo. 436, 98 Pac. Rep. 174, 176. See *Empson P. Co. v. Clawson* (Colo.), 95 Pac. Rep. 546.

Idaho. *Nelson Bennett Co. v. Twin Falls L. & W. Co.* 14 Idaho 5, 93 Pac. Rep. 789, 795, 92 Pac. Rep. 980. See *Spaulding v. Coeur d'Alene Ry. Co.*, 5 Idaho 523, 51 Pac. Rep. 408.

Illinois. See *Mantonya v. Reilly*, 83 Ill. App. 275, affirmed 84 Ill. 183.

Michigan. See *Lamson v. City of Marshall*, 133 Mich. 250, 95 N. W. Rep. 78.

Montana. See *Piper v. Murray* (Mont., April 22, 1911), 115 Pac. Rep. 669, 672.

Washington. *Ilse v. Aetna I. Co.* 55 Wash. 487, 104 Pac. Rep. 787; *Sweatt v. Bonne* (Wash., September 3, 1910), 110 Pac. Rep. 617. See *McKivor v. Savage* (Wash., September 19, 1910), 110 Pac. Rep. 811, 812; *Craig v. Geddis*, 4 Wash. 391, 30 Pac. Rep. 396; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. Rep. 890; *Dickerman v. Reeder*, 109 Pac. Rep. 1060.

Wisconsin. See *Selbert v. Roth*, 118 Wis. 250, 95 N. W. Rep. 119.

See also *Davis v. King*, 66 Conn. 465, 34 Atl. Rep. 107, 50 Am. St. Rep. 104; *Edwards v. Hartshorn*, 72 Kan. 19, 82 Pac. Rep. 520, 1 L. R. A. (N. S.), 1050; *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255; *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463, 20 S. W. Rep. 631, 34 Am. St. Rep. 403; *Mundy v. L. & N. R. Co.*, 67 Fed. Rep. 633, 14 C. C. A. 583; *Baltimore, etc., Ry. Co. v. Scholes*, 14 Ind. App. 524, 43 N. E. Rep. 156, 56 Am. St. Rep. 307, and notes.

³³ **Idaho.** *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 797, 92 Pac. Rep. 980.

New York. See *Sweet v. Morrison*, 116 N. Y. 31, 22 N. E. Rep. 276, 15 Am. St. Rep. 376.

Massachusetts. *Palmer v. Clark*, 106 Mass. 373.

³⁴ **Idaho.** *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 797, 92 Pac. Rep. 980.

³⁵ **Idaho.** *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 797, 92 Pac. Rep. 980.

§ 129b. Same. Duties in general. The architect by his employment as such undertakes to possess reasonable skill, expertness and knowledge in the things he is required to know, and to exercise reasonable care and diligence in performing the services he undertakes to perform and in supervising the work of construction.³⁶

The rule applicable generally to members of learned professions is equally applicable here. These obligations include the skill and knowledge necessary to the planning of structures, qualities and strength of materials, their weight and relationship to the various operations to be performed by the many trades represented in building, and a knowledge of all other matters directly related to drawing plans and specifications.³⁷

The architect must furnish the owner with preliminary sketches and estimates in order to avoid mutual mistakes; also, detailed and completed plans and specifications, and, if requested, estimates of the quantities and costs of material, a proper contract to be entered into by the contractor, where the architect undertakes to draw such contract, a proper form of bond, proper instructions to bidders and a traverse section. The plans and specifications, contract and bond should be so specific that there can be no valid controversy as to any matters therein contained.³⁸ It has already been shown that it is the duty of the architect to see that the plans and specifications embody the intentions and requirements of the owner and to secure the necessary information from the owner to enable him to make definite such intentions and requirements.³⁹

Where the intention of the owner contemplates the enlargement of the structure, or the addition of other stories at a future time, it is necessary for the architect to inquire

³⁶ *Nave v. McGrane* (Idaho, December 20, 1910), 113 Pac. Rep. 82, 85; *Straus v. Buchman*, 96 App. Div. 270, 89 N. Y. Supp. 226; *Hubert v. Aitken*, 15 Daly 237, 2 N. Y. Supp. 711. See, also, *Kinney v. Mami-towa County*, 135 Fed. Rep. 491, 68 C. C. A. 203.

³⁷ *Nave v. McGrane*, *supra.*, quoting from Vol. 1, *Cyclopaedia of Architecture*, pp. 350-351.

³⁸ *Nave v. McGrane* (Idaho, December 20, 1910), 113 Pac. Rep. 82, 84.

³⁹ See § 126, this Supplement, *ante.*

as to the number of the stories to be added, and at least generally as to their purpose and arrangement, and means of access from one to another, so that the plumbing, heating, lighting, furnace flues, stairways and interior arrangements generally, as well as the foundations and walls, may be designed for strength and safety, to practically carry out the future intentions of the owner.⁴⁰

§ 129c. Same. Plans and specifications. Duty to prepare. The duty to prepare plans and specifications so as to carry out the intention of the owner has been already alluded to.⁴¹ Such plans and specifications must be sufficiently specific to prevent any legitimate controversy concerning the kinds and qualities and quantities of materials to be used, or the character of the workmanship.

Definition of "plan." A "plan," when applied to a building, is an architectural drawing representing a horizontal section of the various floors or stories of the building, the disposition of the apartments and walls, with the situation of the doors, windows,—in fact, represents the different stories as they are to be built, and the whole as it will appear when completed.⁴²

Definition of "specifications." Specifications in architecture embrace, as understood by the profession, not only the dimensions and mode of construction, but a description of every piece of material, its kind, length, breadth, and thickness, and the manner of joining the separate parts together.⁴³ "The word specifications when applied to a building means

⁴⁰ Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 85.

⁴¹ See § 129b, this Supplement, ante.

⁴² Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 85; State v. Kendall, 15 Neb. 262, 18 N. W. 85.

⁴³ Bouvier defines them as "a particular and detailed account of a thing";

Gwilt: "They are an accurate description of the materials and work to be used and performed in the execution of a building."

Worcester's Dict.: "A written instrument containing a good and minute description, account, or enumeration of particulars":

Gilbert v. United States, 1 Ct. Cl. 28, citing Encyc. of Architecture, p. 595, par. 19; quoted in Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 85.

a specific and detailed statement of the materials to be used in the building and the manner of performing the work.⁴⁴

Requisites of plans. "The plans when completed should (1) conform with the instructions given to the architect; (2) comply with all laws which may be applicable; (3) not infringe the rights of any third person; and (4) be in accordance with all rules of the architect's science and art. It must be remembered that the employer's mere approval will not be an excuse for faults, of which the employer is not a competent judge."⁴⁵

Requisites of Specifications. Specifications must be so definite as not to leave the quality of the material or of the workmanship to the mutatory whims or caprice of the supervising architect or the contractor; the plans and specifications should be complete, definite and specific.⁴⁶

§ 129d. Same. Duty as to protection of adjoining property. Where the law requires the same, provision should be made in the specifications for protecting the walls and foundations of the adjoining buildings and the other lines of the adjoining properties from caving; for, if no provision is made therefor, the question might arise as to whether the contractor is required to make adequate protection therefor, estimated in the contract price, or the owner.⁴⁷

⁴⁴ State v. Kendall, 15 Neb. 262, 18 N. W. Rep. 85; Nave v. McGrane, *supra*.

⁴⁵ Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 85, quoting 1 Encyc. of Architecture, bottom page 362.

⁴⁶ Nave v. McGrane, *supra*, p. 84.

⁴⁷ Nave v. McGrane (Idaho, December 20, 1910, 113 Pac. Rep. 82, 86. **Specifications:**

As to concrete work and composition of concrete; method of measuring cement, bags and barrels, loose or compact; cement mortar; it is not sufficient to state that one barrel of cement shall be used for so many barrels of sand; specification held insufficient: See Nave v. McGrane, *supra*, p. 86.

As to foundation and masonry below ground; "slushed solid with good lime and sand mortar"; held insufficient, under an ordinance and authorities on architecture: See Nave v. McGrane, *supra*, pp. 86, 87.

As to electric wiring; held insufficient on many grounds: See Nave v. McGrane, *supra*, p. 87.

National Electric Code, used by fire underwriters, held insufficient, as simply formulating general principles according to which electric work should be done, and not specific: See Nave v. McGrane, *supra*, p. 87.

§ 129e. Various duties architects must perform. Traverse section. The first question that occurs to the owner is the cost of construction; and he generally requests the architect to compute the cost of the several items going into the construction of the building so as to ascertain the total cost. The traverse section is one of the necessary drawings to accompany the specifications.⁴⁸

§ 129f. Same. Instructions to bidders. The architect should prepare proper instructions to the bidders to prevent mistakes and misunderstandings; and the architect usually furnishes forms of proposals for bidders to permit competitive bidders to do the same work in the same manner.⁴⁹

§ 129g. Same. Bids. Proposals for bids should be accompanied by the proposed contract, particularly where they, or the plans and specifications submitted therewith, refer to any contract, in order that the acceptance of the bid by the owner may not result in a mere acceptance of a proposition to enter at a later date into a contract, the terms of which are not fixed and definite.⁵⁰

If the plans and specifications are not definite and certain as to the kinds and qualities of material, the class of workmanship, and the like, the bid to construct the building will only indicate a willingness to negotiate further in regard to the matters not specified, and its acceptance will express a like willingness; and neither party will be bound, as their minds have not met, unless they subsequently agree upon the contract.⁵¹

§ 129h. Same. The contract. Where the architect undertakes to draw up the building contract, he impliedly

As to plumbing and heating: specifications held insufficient: See Nave v. McGrane, supra, p. 88.

⁴⁸ Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 86.

⁴⁹ Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 84.

⁵⁰ Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 85. See Gill Mfg. Co. v. Hind (A. C.), 18 Fed. Rep. 673; Shepard v. Carpenter, 54 Minn. 153, 55 N. W. Rep. 906.

⁵¹ Nave v. McGrane, supra.

agrees that he possesses reasonable skill in drafting the instrument such as is possessed by those in the legal profession. The contract should show the time of beginning and completion of the work, the dates and rates of payment, and the kind and amount of indemnity insurance to be carried, and other necessary details, all of which should be definite and specific and expressed in proper legal form.⁵²

The contract or specifications should provide for the certificate of inspection by the architect, and if insurance should be carried pending completion of the building, provisions for bearing loss in case of destruction, for delays, for modification of the plans or specifications as the work progresses, and stipulations regarding changes and extras.⁵³

§ 129i. Same. Bond. A proper form of bond should be provided by the architect, if he undertakes to draw up the building contract, so that the owner may comply with any law requiring the same and that the owner may know what security he is to have against liens and damages and in order that the bidders may understand to what expense they will be put by this item, and the liability that they may incur.⁵⁴

§ 129j. Same. Liability of architect. For failure of the architect to comply with his legal duty with regard to the plans and specifications, bond or contract, the architect is liable to the owner, and he can not under ordinary circumstances recover from the owner for the preparation of the same, particularly where such plans are not used by the owner.⁵⁵

The burden of proving their inadequacy rests upon the owner; but the testimony of contractors to the effect that certain plans and specifications are sufficiently definite and specific to enable them to bid on the construction will not

⁵² Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 84, 85.

See, generally, Building Contracts, §§ 193-360, Treatise, and this Supplement.

⁵³ Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 88.

⁵⁴ Nave v. McGrane, *supra*, p. 84.

⁵⁵ Nave v. McGrane, *supra*.

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be taken as against the plans and specifications themselves, when they clearly show that they are not definite and certain and that they are not in conformity with the recognized authorities on engineering, contracts and specifications and architecture; and this is especially so where the plans and specifications will permit a bidder or contractor to figure on first-class material and workmanship and are not explicit enough to prevent his using inferior material or performing poor workmanship in the construction of the building.⁵⁶

There is always an implied contract on the part of the architect that the work will be suitable for the purpose for which it is prepared; and, apart from questions of public policy, this principle will prevent him from recovering upon plans and specifications prepared in violation of law, unless he was directed so to prepare them by the owner.⁵⁷

⁵⁶ Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 84.

⁵⁷ Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 88; Straus v. Buchman, 96 App. Div. 270, 89 N. Y. Supp. 226.

CHAPTER IX.

LABOR FOR WHICH A LIEN IS GIVEN.

§ 130. Scope of chapter.

Additional matter to foot-note 2.¹

§ 131. Statutory provisions, generally. Structure. First clause.

Additional matter to foot-note 3.²

§ 132. Same. Mines. Second clause.³**§ 133. Same. Grading, etc.⁴****§ 134. Same. Three grand divisions. Generally.⁵****§ 135. Structures and mines. In general.⁶**

¹ **Oregon.** See, generally, *Escott v. Crescent C. & N. Co.* (Oreg., January 25, 1910), 106 Pac. Rep. 452, 455.

² **California.** Under the amendment of 1911 to § 1183, Code Civ. Proc., Stats. & Amdts. 1911, p. 1313, structures and mines are placed in separate clauses, and a clearer segregation, to some extent, at least, may be observed.

³ **California.** Mines are placed in a separate paragraph from the objects enumerated as structures in the amendment of § 1183, Code Civ. Proc., Stats. & Amdts. 1911, p. 1313.

⁴ **California.** § 1191, Code of Civ. Proc., remains untouched by the amendment of 1911, Stats. & Amdts. 1911, p. 1313.

Definition of "grading": See *Hill v. Clark*, 7 Cal. App. 609, 612, 95 Pac. Rep. 382.

Idaho. See *Naylor v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573; s. c., 95 Pac. Rep. 827.

Washington. Lien for clearing land: See *Owen v. Casey*, 48 Wash. 673, 94 Pac. Rep. 473.

⁵ **California.** The three grand divisions still survive under the amendment of 1911, Stats. & Amdts. 1911, p. 1313.

⁶ **California.** Under the amendment to § 1183, Code Civ. Proc., of 1911, Stats. & Amdts. 1911, pp. 1313 et seq., the labor for which a lien is given has been extended, both in the case of mines and structures; and liens are now expressly provided, which previously were in doubt or denied.

§ 136. Importance of fixing clause under which case falls.⁷

§ 137. Same. Classes not mutually exclusive.⁸
Additional matter to foot-note 5.⁹

§ 138. Definition of labor "bestowed."
Additional matter to foot-note 7.¹⁰

§ 139. Grading and other work under § 1191. Generally.
Additional matter to foot-note 10.¹¹

§ 140. Classes, how discussed at this time.¹²

§ 141. "Improvement" defined. Refers to object.
Additional matter to foot-note 12.¹³

§ 142. Structures, and grading and other work, under § 1191.

⁷ *California*. It still remains important to fix the clause under which a particular case falls, for some purposes, under the amendments to the lien law of 1911, Stats. & Amdts. 1911, pp. 1313 et seq.

⁸ *California*. The amendments of 1911, Stats. & Amdts. 1911, pp. 1313 et seq., have not expressly indicated the position occupied by structures erected in mines or mining claims, so far as all of the provisions of the statute are concerned.

⁹ *Idaho*. See *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

¹⁰ *California*. Before the amendment of § 1183, Code of Civ. Proc. in 1911, Stats. & Amdts. 1911, pp. 1313 et seq., one furnishing horses and harness to the contractor did not "bestow" labor, under the circumstances of the case: *Wood, Curtis & Co. v. El Dorado L. Co.*, 153 Cal. 230, 94 Pac. Rep. 877, distinguishing *Macomber v. Bigelow*, 126 Cal. 914, 58 Pac. Rep. 312; but see § 1183, as amended, allowing liens to "teamsters and draymen."

¹¹ *Idaho*. See *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

¹² See §§ 61 et seq., 259 et seq., 269 et seq., 286 et seq. and 315 et seq., this Supplement.

¹³ *Arizona*. See *Schley v. Vall* (Ariz.), 95 Pac. Rep. 113 (in preferred rights to leased land).

Federal. "Improve," "build or rebuild": See *Healey I. M. Co. v. Green* (C. C., N. C.), 181 Fed. Rep. 890, 893.

Idaho. See *Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. Rep. 399.

Montana. "Improvement," in water rights law, compare *Helena W. Co. v. Settles*, 37 Mont. 237, 95 Pac. Rep. 838.

Oklahoma. "Improvement of land," see *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 108 Pac. Rep. 409.

Oregon. "Improvement," in mining law: See *Fredericks v. Klauser*, 52 Oreg. 110, 96 Pac. Rep. 679.

Additional matter to foot-note 14.¹⁴

§ 143. Structures. Liens allowed.

Additional matter to foot-note 20.¹⁵

Additional matter to foot-note 21.¹⁶

§ 144. "Construction, alteration, addition to, or repair."

Additional matter to foot-note 22.¹⁷

§ 145. Same. Importance of determination.¹⁸

¹⁴ **Idaho.** See *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

¹⁵ **California.** Class of persons allowed liens upon structures was enlarged by amendment of § 1183, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq., so as to include those "bestowing skill or other necessary services."

Idaho. *Naylor v. Lewiston & S. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, 577, s. c., 95 Pac. Rep. 827.

Oregon. See *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, explaining *Willamette Falls T. & M. Co. v. Remick*, 1 Oreg. 169, and *Cullins v. Flagstaff S. M. Co.*, 2 Utah 219, affirmed 104 U. S. 176, 26 L. ed. 704.

Washington. *Superintendent of structure allowed lien: MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. Rep. 436, 439.

¹⁶ **California.** The amendment to § 1183, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq., specifically provides for furnishing teams, and for liens for teamsters and draymen.

Oklahoma. *Lien for hauling stone used in a structure: See Alberti v. Moore*, 20 Okl., 78, 93 Pac. Rep. 543, 547.

¹⁷ **California.** "Repair and alteration," compare *Grosse v. Barman*, 9 Cal. App. 650, 100 Pac. Rep. 348.

"Constructed and being constructed," in irrigation law: See *Stowell v. Rialto Irr. Dist.*, 155 Cal. 215, 100 Pac. Rep. 248.

"Construction" work on ship: See *Jensen v. Dorr* (Cal. Sup.), 116 Pac. Rep. 553, s. c., 157 Cal. 437, 108 Pac. Rep. 320.

"Construction" in public utilities ordinance: See *Platt v. City and County of San Francisco* (Cal. Sup.), 110 Pac. Rep. 4, 11.

Idaho. "Repair and improve"; "new construction"; definition: See *Nampa v. Nampa & M. Irr. Dist.* (Idaho), 115 Pac. Rep. 979.

Kansas. See *Potter v. Conley* (Kan., January 7, 1911), 112 Pac. Rep. 608, 610.

Oregon. "Construction and repair work": See *Crane Co. v. Ellis* (Oreg., March 28, 1911), 114 Pac. Rep. 475, 476.

Washington. "Construction, alteration, improvement or repair": See *Stetson & Post L. Co. v. W. & J. Sloane Co.* (Wash., December 12, 1910), 112 Pac. Rep. 248, 249, 250.

¹⁸ See "Material-man," §§ 77 to 103, this Supplement, ante.

California. But see amendment of § 1183, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq.

§ 146. Character of alteration.

Additional matter to foot-note 25.¹⁹

§ 147. Distinction between "alteration" and "repair."²⁰

Additional matter to foot-note 26.²¹

§ 148. Same. Alteration. Erection.

Additional matter to foot-note 27.²²

§ 149. Work in mines and mining claims. Second clause.

A lien is not given for any and every work that may be done upon or about a mining claim, but only if the work is done in the development thereof or in working thereon by the subtractive process,²³ where the statute so provides.

Additional matter to foot-note 28.²⁴

Additional matter to foot-note 29.²⁵

Additional matter to foot-note 30.²⁶

¹⁹ See § 44, thus Supplement, ante.

²⁰ *California*. "Repair and alteration": Compare *Grosse v. Barman*, 9 Cal. App. 650, 100 Pac. Rep. 348.

"Repair" defined in reclamation law: See *Reclamation Dist. v. Clark*, 155 Cal. 1091, 100 Pac. Rep. 1091.

²¹ Structure destroyed; reconstruction, whether "alteration" or "repair," or entirely new structure: See *Pusey v. Pennsylvania P. Mills* (C. C., Pa.), 173 Fed. Rep. 634, 640.

²² "Improve," "build or rebuild": See *Healey I. M. Co. v. Green* (C. C., N. C.), 181 Fed. Rep. 890, 893.

Reconstruction, whether alteration or repair, or new structure: See *Pusey v. Pennsylvania P. Mills* (C. C., Pa.), 173 Fed. Rep. 634, 640.

"Repair and improve"; "new construction": See *City of Nampa v. Nampa & M. Irr. Dist.* (Idaho), 115 Pac. Rep. 979; *Morton v. Wessinger* (Oreg., February 14, 1911), 113 Pac. Rep. 7.

"Alteration, improvement, repair": See *Stetson & Post L. Co. v. W. & J. Sloane Co.* (Wash., December 12, 1910), 112 Pac. Rep. 248, 249, 250.

²³ *California*. *Donaldson v. Orchard C. O. Co.*, 6 Cal. App. 641, 645, 92 Pac. Rep. 1046.

²⁴ *Oregon*. "Labor upon a mine": See *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, 897.

New Mexico. Lien allowed for actual manual labor in limestone quarry, and on lime kiln in mine: *Gray v. New Mexico P. & S. Co.* (N. M.), 110 Pac. Rep. 603, 604.

²⁵ *Oregon*. See *Escott v. Crescent C. & N. Co.* (Oreg., January 25, 1910), 106 Pac. Rep. 452, 455.

²⁶ *Blasting, lien allowed*: *James v. Beebe* (Wash., July 18, 1910), 109 Pac. Rep. 1032.

Additional matter to foot-note 31.²⁷

§ 150. Same. Liens allowed.

Additional matter to foot-note 33.²⁸

Additional matter to foot-note 34.²⁹

Additional matter to foot-note 35.³⁰

Additional matter to foot-note 36.³¹

Additional matter to foot-note 37.³²

²⁷ **Alaska.** See *Pioneer M. Co. v. Delamotte* (C. C. A.), 185 Fed. Rep. 752, 755.

California. Development of water: See *Garvey W. Co. v. Huntington L. & I. Co.*, 154 Cal. 232, 97 Pac. Rep. 428.

Montana. See *McIntyre v. Montana G. M. & M. Co.*, 41 Mont. 87, 108 Pac. Rep. 357.

New Mexico. *Gray v. New Mexico P. S. Co.* (N. M.), 100 Pac. Rep. 603.

²⁸ **Oregon.** Extracting ore and breaking ground, lien allowed: *Washburn v. Intermountain M. Co.* (Oreg., June 28, 1910), 109 Pac. Rep. 382, 386.

²⁹ **New Mexico.** Superintendent of construction of mill in mine, lien allowed: *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710, distinguishing New Mexico cases cited in Treatise to this note.

Overseeing laborers with whom he worked, lien allowed: *Gray v. New Mexico P. S. Co.*, 110 Pac. Rep. 603, 604 (under Comp. L. 1897, § 2221).

Oregon. Otherwise, when not accompanied by manual labor; thus, superintendent and general manager of a mine is not person performing labor upon a mine within meaning of § 5668, B. & C. Comp., as amended by Sess. Laws 1907, p. 294, which applies only to those performing physical labor; and such superintendent has no lien: *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895. See also *Washburn v. Intermountain M. Co.* (Oreg., June 28, 1910), 109 Pac. Rep. 382, 386; but a foreman who does general work, made things, framed timbers, and looked after work on mine as foreman, and took part in the erection of a mill, entitled to a lien: *Washburn v. Intermountain M. Co.*, supra.

³⁰ **Montana.** Lien allowed for repair work on tunnel, cutting cordwood for fuel; for construction of mill and in operating it; building roadway to mill, etc.: *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

³¹ **Oklahoma.** Development of coal mine, "improvement of land," and lien now allowed under Sess. Laws 1909, c. 23, art. 3, § 1, p. 886, for development labor, and also for taking out coal; previously lien not allowed: *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 108 Pac. Rep. 409, 413.

³² **Kansas.** Lien for labor in discovery and obtaining oil from ground: See *Phillips v. Springfield C. O. Co.*, 76 Kan. 783, 92 Pac. Rep. 1119; *Martin v. Springfield C. O. Co.*, 77 Kan. 851, 92 Pac. Rep. 1119, distinguishing *Eastern O. Co. v. McEvoy*, 75 Kan. 515, 89 Pac. Rep. 1048.

Additional matter to foot-note 38.³³

Additional matter to foot-note 39.³⁴

§ 151. Same. Notice of non-responsibility. Tunnel.³⁵

§ 152. Same. Drifting.³⁶

§ 153. Same. Running tunnel.

Additional matter to foot-note 42.³⁷

§ 154. Same. Shaft. Mining instrumentalities.³⁸

§ 155. Same. Watchman of idle mine.

Additional matter to foot-note 44.³⁹

§ 156. Grading, etc., under § 1191.

Additional matter to foot-note 45.⁴⁰

Additional matter to foot-note 46.⁴¹

Additional matter to foot-note 47.⁴²

§ 157. Same. Work not enforceable under this section.⁴³

³³ New Mexico. *Gray v. New Mexico P. S. Co.*, 110 Pac. Rep. 603, 605.

³⁴ Montana. "Repair and alteration of mine": See *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

Oklahoma. Compare *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 108 Pac. Rep. 409.

³⁵ See Notice of non-responsibility, §§ 469 et seq., this Supplement, post.

See § 153, matter to foot-note of Treatise 42.

Tunnel: See § 150, this Supplement.

³⁶ See matter to foot-note 42 of Treatise, § 153, this Supplement.

³⁷ Washington. Compare *Price v. Clallam C. Co.* (Wash., November 30, 1910), 111 Pac. Rep. 893.

³⁸ Montana. See *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

³⁹ California. *Donaldson v. Orchard C. O. Co.*, 6 Cal. App. 641, 645, 92 Pac. Rep. 1046.

New Mexico. Preparing mine so that it can be left without caretaker, no lien: *Gray v. New Mexico P. S. Co.*, 110 Pac. Rep. 603, 604.

⁴⁰ California. Definition of "grading": See *Hill v. Clark*, 7 Cal. App. 609, 612, 95 Pac. Rep. 382.

⁴¹ California. Compare *McQuiddy v. Worswick S. P. Co.* (Cal. Sup., May 26, 1911), 116 Pac. Rep. 67.

⁴² California. See *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. Rep. 382.

⁴³ California. § 1191, Code Civ. Proc., was not amended in 1911.

§ 158. Same. Meaning of "improves," "improvement."⁴⁴

Additional matter to foot-note 51.⁴⁵

§ 159. Same. Relation to work on structures.⁴⁶

§ 160. Same. Liens allowed.

Additional matter to foot-note 53.⁴⁷

Additional matter to foot-note 54.⁴⁸

Additional matter to foot-note 56.⁴⁹

§ 161. Labor for which lien is not given in any event.

Additional matter to foot-note 58.⁵⁰

§ 162. Same. Preliminary work.

Additional matter to foot-note 59.⁵¹

Additional matter to foot-note 60.⁵²

⁴⁴ See notes § 141, this Supplement.

⁴⁵ **Improvement of land,** compare *Peaceable Creek C. Co. v. Jackson*, 26 Okl., 1, 108 Pac. Rep. 409.

⁴⁶ **Improve,** "build or rebuild," see *Healey I. M. Co. v. Green* (C. C., N. C.), 181 Fed. Rep. 890, 893.

⁴⁷ **Repair and improve,** compare *City of Nampa v. Nampa & M. Irr. Dist.* (Idaho, May 13, 1911), 115 Pac. Rep. 979.

⁴⁸ **Idaho. Rules regarding ownership of sidewalks** by owner of abutting property in support of lien on abutting property: See *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

⁴⁹ **California.** § 1191, Code Civ. Proc., was not amended in 1911.

⁵⁰ **Washington. Grading and filling in street** in front of property, lien allowed: *Hall v. Cowen*, 51 Wash. 295, 98 Pac. Rep. 670.

⁵¹ **Definition of "block":** See *Slater v. Fire & P. Board*, 43 Colo. 225, 96 Pac. Rep. 554; *Town of Fruita v. Williams*, 33 Colo. 157, 80 Pac. Rep. 132; *Harrison v. People*, 195 Ill. 466, 63 N. E. Rep. 191.

⁵² **Idaho.** *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399 (under §§ 5510, 5512, Rev. Codes).

See § 158, this Supplement, ante.

⁵³ **Oregon. Superintendence:** See *Washburn v. Intermountain M. Co.* (Oreg., June 28, 1910), 109 Pac. Rep. 382, 386.

See §§ 162-165, this Supplement, post.

⁵⁴ **Idaho. Lien allowed for general railroad construction**, shoveling, blasting, clearing sagebrush from railroad right of way, and compensation for use of tools: *Naylor v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho, 789, 96 Pac. Rep. 573, 95 Pac. Rep. 827.

⁵⁵ **California. Roundabout and well cleaner on mine:** See *Donaldson v. Orchard C. O. Co.*, 6 Cal. App. 641, 645, 92 Pac. Rep. 1046.

⁵⁶ **New Mexico. Taking care of horses for owner of mine:** *Gray v. New Mexico P. S. Co.* (N. M.), 110 Pac. Rep. 603, 604.

§ 163. Same. Teaming for material-man.

Additional matter to foot-note 61.⁵³

§ 164. Same. Material-man's laborer.⁵⁴

§ 165. Same. Test, legitimate connection with work of mine.

Additional matter to foot-note 64.⁵⁵

Oregon. Persons working in a boarding house or cooking for employers at mine have no lien under § 5668, B. & C. Comp., since amendment of 1907; before that amendment, lien was allowed: *Durkheimer v. Copperopolis C. Co.* (Oreg., November 15, 1909), 104 Pac. Rep. 895, 898.

Washington. *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766.

⁵³ **California.** See *Wood Curtis & Co. v. El Dorado L. Co.*, 153 Cal. 230, 94 Pac. Rep. 877.

See § 1183, Code Civ. Proc., as amended 1911, Stats. & Amdts. 1911, pp. 1313 et seq.

⁵⁴ See § 46, this Supplement, ante.

⁵⁵ **Montana.** See *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

New Mexico. *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 604.

But see § 150, this Supplement, ante.

CHAPTER X.

OBJECT ON WHICH LABOR MUST BE PERFORMED.

§ 166. Distinction between "object" and "property."Additional matter to foot-note 1.¹Additional matter to foot-note 2.²**§ 167. Constitutional provision.³****§ 168. Division of the statute.**Additional matter to foot-note 5.⁴**§ 169. Statutory provisions.**Additional matter to foot-note 6.⁵**§ 170. Definition of terms used herein.⁶****§ 171. Same. "Improvement." "Structure."**Additional matter to foot-note 10.⁷Additional matter to foot-note 11.⁸

¹ **Colorado.** Right to use water for irrigation, real estate: *Davis v. Randall*, 44 Colo. 488, 99 Pac. Rep. 322, 324.

Montana. Definition of "property": See *Helena W. Co. v. Settles*, 37 Mont. 237, 95 Pac. Rep. 838.

² **California.** Mining claim on public land, property: *Van Ness v. Rooney* (Cal. Sup., June 6, 1911), 116 Pac. Rep. 392, 394.

³ See §§ 28-41, this Supplement, ante.

⁴ **California.** The general division of objects remains the same under the amendment of the mechanics' lien law of 1911, Stats. & Amdts. 1911, pp. 1313 et seq. See §§ 134 et seq., this Supplement, ante.

⁵ **California.** The objects under the first and second clauses of § 1183, Code of Civ. Proc., as amended in 1911, Stats. & Amdts. 1911, pp. 1313 et seq., have not been changed, with reference to structures and mines and mining claims; and § 1191, with reference to grading, etc., remains the same.

⁶ See § 166, this Supplement, ante.

⁷ **Oregon.** Compare *Alderson v. Lee*, 52 Oreg. 92, 96 Pac. Rep. 234, 236.

Washington. Compare *State v. Puget Sound & G. H. Ry. Co.*, 103 Pac. Rep. 80.

⁸ **Arizona.** Definition of "improvements": See *Schley v. Vall*, 95 Pac. Rep. 113.

§ 172. Structure on a mine. Oil well.
Additional matter to foot-note 14.⁹

§ 173. "Structures," in general. First clause of statute.
Additional matter to foot-note 15.¹⁰

§ 174. Structures not enumerated in statute.¹¹

§ 175. Structures enumerated in statute. Buildings.
Additional matter to foot-note 20.¹²

§ 176. Same. Bridges.
Additional matter to foot-note 29.¹³

§ 177. Same. Aqueduct, ditch and flume.
Additional matter to foot-note 31.¹⁴

Montana. Definition of "improvements": See *Helena W. Co. v. Settles*, 37 Mont. 237, 95 Pac. Rep. 838.

Oklahoma. "Improvement of land": *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 108 Pac. Rep. 409. See *Bates v. Harte*, 124 Ala. 427, 26 South. Rep. 898, 82 Am. St. Rep. 186.

See § 172, this Supplement, post.

⁹ Oregon. Compare *Alderson v. Lee*, 52 Oreg. 92, 96 Pac. Rep. 234, 236; *Fredericks v. Klausner*, 52 Oreg. 110, 96 Pac. Rep. 679.

¹⁰ Idaho. "Other structures" in mine; "other improvements, aforesaid": See *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

Oregon. Compare *Alderson v. Lee*, 52 Oreg. 92, 96 Pac. Rep. 234, 236.

¹¹ Colorado. Definition of embankment and dam: See *Garnet D. & R. Co. v. Sampson*, 110 Pac. Rep. 79, 83.

¹² Kansas. Definition of "building": *State v. Landers*, 81 Kan. 836, 106 Pac. Rep. 1029.

Oregon. "Frame building" in San Francisco ordinance; held synonymous with wooden building: *Morton v. Wessinger* (Oreg., February 14, 1911), 113 Pac. Rep. 7. See *Ward v. City of Murphysboro*, 77 Ill. App. 549.

Washington. "Building" not including basement in building ordinance: See *Davis v. City of Walla Walla*, 52 Wash. 453, 100 Pac. Rep. 981, 982.

¹³ California. See § 2712, Pol. Code, relating to repair and maintenance of bridges, amended Stats. & Amdts. 1911, c. 82.

"Wharf": See *Bankers T. Co. v. T. A. Gillespie Co.* (C. C. A.), 181 Fed. Rep. 448.

¹⁴ Colorado. Lien on ditch: *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918.

Idaho. "Canal," lien on: *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 92 Pac. Rep. 980.

Conduit, not strictly ditch or canal: See *Idaho P. & T. Co. v. Stephenson*, 16 Idaho 418, 101 Pac. Rep. 821, 824.

§ 178. Same. Well.Additional matter to foot-note 32.¹⁵**§ 179. Same. Tunnel.**Additional matter to foot-note 35.¹⁶**§ 180. Same. Machinery.**Additional matter to foot-note 37.¹⁷Additional matter to foot-note 38.¹⁸**§ 181. Same. Railroad.**Additional matter to foot-note 39.¹⁹**§ 182. Mining claims, and real property worked as a mine.
Second clause of statute.**Additional matter to foot-note 41.²⁰Additional matter to foot-note 42.²¹

Oregon. Locks of canal, highway: See *State v. Portland G. E. Co.*, 52 Oreg. 502, 95 Pac. Rep. 722, 728, 729.

¹⁵ See § 172, this Supplement, wells as mining claims.

Montana. "Clatern": See *Neuman v. Grant*, 36 Mont. 77, 92 Pac. Rep. 43.

See Tunnel, § 179, this Supplement, post.

¹⁶ **California. Tunnel "practically horizontal well":** *Garvey W. Co. v. Huntington*, 154 Cal. 232, 241, 97 Pac. Rep. 428.

Montana. Lien for repairing tunnel: *McIntyre v. Montana G. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

Washington. Compare Price v. Clallam C. Co. (Wash., November 30, 1910), 111 Pac. Rep. 893.

¹⁷ **California. Definition of "machine":** See *Korander v. Penn. B. Co.* (Cal. App., May 11, 1911), 116 Pac. Rep. 384; *Stearns v. Russell*, 85 Fed. Rep. 225, 29 C. C. A. 121.

Gas generators: See *Lacy M. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 106 Pac. Rep. 413.

¹⁸ **Kansas.** See *Hathaway v. Davis*, 32 Kan. 693, 5 Pac. Rep. 29.

Oklahoma. See *Jarrell v. Block*, 19 Okl. 467, 92 Pac. Rep. 167, 169.

Washington. Laundry plant: *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727.

Sawmill and wood-working plant: Compare *Zimmermann v. Bosse* (Wash., November 23, 1910), 111 Pac. Rep. 796.

¹⁹ **Colorado. Lien allowed for construction of railroad:** *Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573.

Federal. See *Brooks v. Railroad*, 101 U. S. 443, 25 L. ed. 1057.

Idaho. See *Naylor v. Lewiston & S. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, s. c. 95 Pac. Rep. 827.

²⁰ **Oregon.** See *Escott v. Crescent C. & N. Co.* (Oreg., January 25, 1910), 106 Pac. Rep. 452, 454.

²¹ **Idaho.** See *Salisbury v. Lane* 7 Idaho 370, 63 Pac. Rep. 383.

Additional matter to foot-note 43.²²

Additional matter to foot-note 44.²³

Additional matter to foot-note 46.²⁴

Additional matter to foot-note 47.²⁵

§ 183. Definition of "mine."

Additional matter to foot-note 48.²⁶

§ 184. Grading and street-work under code provision.

Additional matter to foot-note 49.²⁷

Additional matter to foot-note 52.²⁸

New Mexico. See *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 606.

Oregon. *Escott v. Crescent C. & N. Co. (Oreg., January 25, 1910)*, 106 Pac. Rep. 452, 454.

²² **California.** *Right of possession of land for mining oil: Compare Graciosa O. Co. v. Santa Barbara County*, 155 Cal. 140, 99 Pac. Rep. 483, 486.

Idaho. See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 792, 92 Pac. Rep. 980.

Oregon. *Escott v. Crescent C. & N. Co. (Oreg., January 25, 1910)*, 106 Pac. Rep. 452, 454.

²³ **Oregon.** See *Escott v. Crescent C. & N. Co. (Oreg., January 25, 1910)*, 106 Pac. Rep. 452, 454.

²⁴ **New Mexico.** See *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 606.

Oregon. See *Escott v. Crescent C. & N. Co. (Oreg., January 25, 1910)*, 106 Pac. Rep. 452, 454.

²⁵ **Oregon.** See *Escott v. Crescent C. & N. Co.*, *supra*.

²⁶ **Montana.** *Definition of "mine": Smith v. Sherman M. Co.*, 12 Mont. 524, 31 Pac. Rep. 72.

Oregon. *Definition of "mine," "coal mine," "mining claim," and "mining": Escott v. Crescent C. & N. Co. (Oreg., January 25, 1910)*, 106 Pac. Rep. 452, 454.

Utah. See *Nephi P. & M. Co. v. Juab County*, 33 Utah 114, 93 Pac. Rep. 535.

²⁷ **California.** *Definition of street: See Williams v. San Francisco & N. W. Co.*, 6 Cal. App. 715, 93 Pac. Rep. 122; *Marini v. Graham*, 67 Cal. 130, 7 Pac. Rep. 442.

Colorado. *Board of Public Works v. Hayden*, 13 Colo. App. 36, 56 Pac. Rep. 201.

Oregon. *Heiple v. City of East Portland*, 13 Oreg. 97, 8 Pac. Rep. 907.

Utah. *Davidson v. Utah I. T. Co.*, 34 Utah 249, 97 Pac. Rep. 124, 125.

Washington. *"Lot": See City of Seattle v. Seattle E. Co. (Wash.)*, 94 Pac. Rep. 194.

Sidewalks; rules as to ownership: See *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

²⁸ **Kansas.** See *Smith v. Chicago L. & C. Co. (Kan., March 11, 1911)*, 114 Pac. Rep. 372, 374.

§ 185. Fixtures. In general.

Additional matter to foot-note 54.²⁹

§ 186. Same. Question of fact. Building.

Additional matter to foot-note 55.³⁰

§ 187. Same. Principles of determination.³¹

Additional matter to foot-note 57.³²

Additional matter to foot-note 58.³³

§ 188. Lien primarily on structure.

Additional matter to foot-note 61.³⁴

§ 189. Work upon fixtures, how deemed.

Additional matter to foot-note 62.³⁵

²⁹ **Fixtures, generally,** see note to *Reynolds v. Ashby*, 1 Brit. Rul. Cases 1, 11.

Electric wiring and fixtures: See *Rowen v. Alladio*, 51 Oreg. 121, 93 Pac. Rep. 929.

³⁰ **California. Cells in jail as fixtures:** See *Sarver v. Los Angeles County*, 156 Cal. 187, 103 Pac. Rep. 917.

Colorado. Building as fixture: See *Hughes v. Kershow*, 42 Colo. 210, 93 Pac. Rep. 1116.

Oklahoma. Lien does not attach to an improvement separate and apart from some interest of the owner in the realty whereon it is situated: *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214. See §§ 15, 45, 95, this Supplement, ante.

Washington. See *Weich v. McDonald* (Wash., July 11, 1911), 116 Pac. Rep. 589.

³¹ **Washington. General principles as to fixtures:** *American R. Co. v. Pendleton* (Wash., February 2, 1911), 112 Pac. Rep. 1117; *Stetson & Post L. Co. v. W. & J. Sloane Co.* (Wash., December 12, 1910), 112 Pac. Rep. 248, 249, 250; *Filley v. Christopher*, 39 Wash. 22, 80 Pac. Rep. 834, 109 Am. St. Rep. 853; *Gasaway v. Thomas*, 56 Wash. 77, 105 Pac. Rep. 168, 170.

³² **Oregon.** *Washburn v. Intermountain M. Co.* (Oreg., June 28, 1910), 109 Pac. Rep. 382, 384.

Wyoming. Fixtures as between mortgagor and mortgagee: See *Anderson v. Englehart* (Wyo., June 2, 1910), 108 Pac. Rep. 977.

³³ **Oregon.** *Washburn v. Intermountain M. Co.* (Oreg., June 28, 1910), 109 Pac. Rep. 382, 384.

³⁴ **Oklahoma. No lien on fixture as personality:** See *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214.

See § 189, this Supplement, post.

³⁵ **No lien on personal property:**

Kansas. See *Hathaway v. Davis*, 32 Kan. 693, 5 Pac. Rep. 29.

Missouri. *Armstrong Cork Co. v. Merchants R. Co.* (C. C. A.), 171 Fed. Rep. 778.

§ 190. The severance of buildings from the freehold.

Additional matter to foot-note 64.³⁶

Additional matter to foot-note 65.³⁷

§ 191. Work on fixtures in mine.³⁸

Additional matter to foot-note 66.³⁹

§ 192. Public property.

Additional matter to foot-note 68.⁴⁰

Additional matter to foot-note 69.⁴¹

Oklahoma. See *Jarrell v. Block*, 19 Okl. 467, 92 Pac. Rep. 167, 169; *Block v. Pearson*, 19 Okl. 422; *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214.

³⁶ See §§ 188 and 189, this Supplement, ante.

Montana. House as movable fixture: Compare *Eisenhauer v. Quinn*, 36 Mont. 368, 93 Pac. Rep. 38.

Missouri. See *Armstrong Cork Co. v. Merchants R. Co. (C. C. A.)*, 184 Fed. Rep. 199, 207; s. c. (C. C., Mo.), 171 Fed. Rep. 778.

Washington. See *Welch v. McDonald* (Wash., July 11, 1911), 116 Pac. Rep. 589.

³⁷ **Oklahoma.** See *Jarrell v. Block*, 19 Okl. 467, 92 Pac. Rep. 167, 169; *Keel v. Ingersoll* (Okl., September 13, 1910), 111 Pac. Rep. 214.

³⁸ **California. Mining machinery as fixtures on a mine, as between vendor and vendee:** *Conde v. Sweeney* (Cal. App., August 4, 1910), 110 Pac. Rep. 973; s. c., 116 Pac. Rep. 319.

³⁹ **Montana. Machine and tools as fixtures on mine:** See *Brittania M. Co. v. United States F. & G. Co.* (Mont., March 22, 1911), 115 Pac. Rep. 46.

Nevada. Compare *Arnold v. Goldfield T. C. M. Co.* (Nev., July 1, 1910), 109 Pac. Rep. 718.

Oregon. See *Washburn v. Intermountain M. Co.* (Oreg., June 28, 1910), 109 Pac. Rep. 382, 385.

Utah. See *Park City M. Co. v. Comstock S. M. Co.* (Utah, June 12, 1909), 103 Pac. Rep. 254, 259.

⁴⁰ See § 564, this Supplement, post.

Public property generally:

California. Public improvements by day work under Stats. & Amdts. 1901, p. 30: See *Perry v. City of Los Angeles* (Cal. Sup.), 108 Pac. Rep. 410; *Fox v. Hubbard*, 108 Pac. Rep. 413.

Bond Act of 1897 (Stats. & Amdts. 1897, p. 201): See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Colorado. Contractor's bond on public work: See *State Board of Agriculture v. Dimick*, 46 Colo. 609, 105 Pac. Rep. 1114, 1115.

Oregon. Locks of canal as part of public highway. See *State v. Portland G. E. Co.*, 52 Oreg. 502, 95 Pac. Rep. 722, 728, 729.

Washington. Contractor's bond on public work: See *Fransoli v. Thompson*, 55 Wash. 259, 104 Pac. Rep. 278, 280; *Cascade L. Co. v. Aetna I. Co.*, 56 Wash. 503, 106 Pac. Rep. 160; *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. Rep. 112.

⁴¹ **California.** *Goldtree v. City of San Diego*, 8 Cal. App. 505, 510, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Additional matter to foot-note 70.⁴²

Additional matter to foot-note 72.⁴³

Additional matter to foot-note 73.⁴⁴

Additional matter to foot-note 76.⁴⁵

⁴² **Idaho.** Rathbun v. State, 15 Idaho 273, 97 Pac. Rep. 335, 337.

Kansas. See Seitz v. Union Pac. Ry. Co., 16 Kan. 133; Hathaway v. Davis, 32 Kan. 693, 5 Pac. Rep. 29; Chicago L. Co. v. Osborn, 40 Kan. 168, 19 Pac. Rep. 656; Mulvane v. Chicago L. Co., 56 Kan. 675, 44 Pac. Rep. 613.

Oklahoma. Block v. Pearson, 19 Okl., 422, 91 Pac. Rep. 714. See Jarrell v. Block, 19 Okl. 467, 92 Pac. Rep. 167, 168.

⁴³ **Colorado.** No mechanic's lien on public property: State Board of Agriculture v. Dimick, 46 Colo. 609, 105 Pac. Rep. 1114.

Idaho. No lien on state property: Rathbun v. State, 15 Idaho 273, 97 Pac. Rep. 335, 336. See Nelson Bennett Co. v. Twin Falls L. & W. Co. 14 Idaho 5, 93 Pac. Rep. 789, 791, 92 Pac. Rep. 980.

Oregon. As a general rule the property of a quasi-public corporation, affected with a public use and necessary to the performance thereof, is not subject to a mechanic's lien; there is a difference as to what constitutes a quasi-public corporation, and as to when the property of such corporation is affected by a public use: Benbow v. The James Johns (Oreg., May 10, 1910), 108 Pac. Rep. 634, 636 (lien on boat); and see Hill v. La Crosse & M. R. R. Co., 11 Wis. 215; but if the lien has attached to the property before it is acquired by the public the lien remains: Benbow v. The James Johns, supra; and see City of Salem v. Lane & Bodley Co., 90 Ill. App. 560, affirming 189 Ill., 594, 60 N. E. Rep. 37, 87 Am. St. Rep. 481.

⁴⁴ **California.** Goldtree v. City of San Diego, 8 Cal. App. 505, 510, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Kansas. But see, contra, Home L. & S. Co. v. School Dist. (Kan., May 6, 1911), 115 Pac. Rep. 590 (whether lien could be foreclosed upon public property was not discussed in opinion).

North Carolina. See Hardware Co. v. Graded School, 150 N. C. 680; s. c., 151 N. C. 507.

Oklahoma. Compare McCarthy v. Cain, (Okl., August 23, 1910), 110 Pac. Rep. 653.

⁴⁵ **Idaho.** Compare Rathbun v. State, 15 Idaho 273, 97 Pac. Rep. 335, 337.

CHAPTER XI.

BUILDING CONTRACTS. GENERAL PRINCIPLES.

§ 193. General principles applicable.¹

§ 194. Term "original contract" not used in the statute.
Additional matter to foot-note 3.²

§ 195. Essentials of contract. How treated herein.
Additional matter to foot-note 7.³

§ 196. Definition of "contract."
Additional matter to foot-note 9.⁴

§ 197. Definition of "building contract."⁵

§ 198. Parties to contract. Competency.
Additional matter to foot-note 11.⁶

¹ As to public contracts, see §§ 201a, 201b and 201c, this Supplement, post.

² California. The amendment of § 1183, Code Civ. Proc. of May 1, 1911, Stats. & Amdts. 1911, p. 1313, uses the expression "original contract."

³ Oregon. See absence of contractual relation with owner by reason of unauthorized contract made by its architect: *Litherland v. S. Morton Cohn R. E. & I. Co.*, 54 Oreg. 71, 100 Pac. Rep. 1, 100 Pac. Rep. 303.

⁴ Lawful object:

California. Illegal construction of building not rendering lease void: See *Wayman Inv. Co. v. Wessinger* (Cal. App.), 108 Pac. Rep. 1022.

Invalid provision in contract for employment of unnaturalized citizens: *City S. I. Co. v. Kroh*, 158 Cal. 308, 110 Pac. Rep. 933, 941.

Illegal public contracts, stifling competition:

California. See *City S. I. Co. v. Kroh*, supra.

Kansas. *National S. Co. v. Wyandotte C. & L. Co.*, 76 Kan. 914, 92 Pac. Rep. 1111; s. c., sub nom. *Atkin v. Wyandotte C. & L. Co.* 73 Kan. 768, 84 Pac. Rep. 1040.

See § 201a, Public corporations, this Supplement, post.

⁵ See "Nature of Labor," §§ 130-165, and "Object of Labor," §§ 166-192 this Supplement, ante.

⁶ See § 201a this Supplement, post, as to public contracts.

§ 199. Same. Guardian of minor.

Additional matter to foot-note 13.⁷

§ 200. Same. Executor. Executors and administrators may make expenditures to preserve the property of the estate,⁸ as by putting in place the lumber of an uncompleted structure;⁹ yet, upon the executor's refusal to do so, the devisee who places the lumber in situ with full knowledge of the facts is deemed to have done it voluntarily, and can not recover the amount from the estate. The proper course for the devisee is to apply to the court for an order requiring the executor to make such expenditures as are necessary to preserve the property.

Executors have no right to expend funds of the estate in doing new work which the testator himself is not bound to do; as where he was constructing a house by day labor, and there are no uncompleted original contracts, or where the executor erects a new building upon the property of the estate.¹⁰ If a lot with a house in course of erection is devised under a will, it is not indicated by that fact alone that the house should be brought to the point of completion by the personal representatives of the deceased.¹¹

§ 201. Same. Corporations.¹²

⁷ Compare powers of executors and administrators, § 200 this Supplement, post.

California. Los Angeles County v. Winans, 13 Cal. App. 234, 109 Pac. Rep. 640, 649; s. c., 109 Pac. Rep. 650.

⁸ In re Hinchon's Estate (Cal. Sup., May 16, 1911), 116 Pac. Rep. 47, 50; In re Close, 110 Cal. 494, 42 Pac. Rep. 971; Byrd v. Governor, 2 Mo. 102. See Gray v. Hawkins, 8 Ohio St. 449, 77 Am. Dec. 600.

⁹ **California.** In re Hinchon's Estate (Cal. Sup., May 16, 1911), 116 Pac. Rep. 47, 50.

¹⁰ **California.** In re Hinchon's Estate, supra. See In re Moore, 72 Cal. 335, 13 Pac. Rep. 880.

¹¹ **California.** In re Hinchon's Estate, supra.

¹² **Foreign corporations; compliance with state laws;** see various lines of authorities:

Idaho. Valley L. Co. v. Driessel, 13 Idaho 662, 93 Pac. Rep. 765, 770; Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24, 25. See Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 800; s. c., 92 Pac. Rep. 980.

New Mexico. Foreign corporation as claimant: See Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co., 14 N. M. 300, 93 Pac. Rep. 706.

Additional matter to foot-note 17.¹³

§ 201a. Same. Public corporations.¹⁴ It is a general principle of law applying to the letting of contracts for pub-

Apparent authority of officer:

California. See *Ellis v. Gray Bros. C. R. Co.*, 18 Cal. App. 33, 108 Pac. Rep. 735 (secretary; estoppel of corporation).

Idaho. See *Valley L. Co. v. McGilvery*, 16 Idaho 338, 101 Pac. Rep. 94.

Kansas. Officer's acts prohibited by by-laws can not be ratified: *Hoffman v. Farmers' Co-op. S. Assoc.*, 78 Kan. 561, 97 Pac. Rep. 440, 443.

Authority of president of corporation: *Harding v. Oregon-Idaho Co.* (Oreg.), 110 Pac. Rep. 412, 415. See *Wait v. Nashua A. Assoc.*, 66 N. H. 581, 23 Atl. Rep. 77, 14 L. R. A. 356, 4 Am. St. Rep. 630; *Lundon M. Co. v. Lyndon L. I.*, 63 Vt. 581, 22 Atl. Rep. 575, 25 Am. St. Rep. 783; *Derr v. Fisher*, 22 Okl. 126, 98 Pac. Rep. 978.

¹³ See § 446, this Supplement, post.

Oregon. Director of corporation as claimant; knowledge of president and secretary, not imputable to him: Compare *Washburn v. Inter-Mountain M. Co.* (Oreg., June 28, 1910), 109 Pac. Rep. 382, 385.

Washington. Corporation as claimant: See *Pacific I. & S. Works v. Goerig*, 55 Wash. 149, 104 Pac. Rep. 151.

14 Signing of contract by proper officer:

Idaho. Signing of contract of municipality by mayor of a city, held insufficient without authorization or ratification: *Woodward v. City of Grangerville*, 13 Idaho 652, 92 Pac. Rep. 840.

Washington. See *Griffin v. City of Tacoma*, 49 Wash. 524, 95 Pac. Rep. 1107.

California. Contracts for furnishings: See *Sarver v. Los Angeles County*, 156 Cal. 187, 103 Pac. Rep. 917, distinguishing *Erbie v. Leary*, 114 Cal. 238, 46 Pac. Rep. 1.

Washington. Recovery of contractor on contract violating statute: *Green v. Okanogan County* (Wash., October 12, 1910), 111 Pac. Rep. 226.

Powers of public corporations:

California. Passage of resolution and posting notice inviting bids, preliminary to public contract: See *Gay v. Engebretson*, 158 Cal. 21, 109 Pac. Rep. 877; s. c., sub nom. *Engebretson v. Gay*, 158 Cal. 27, 30, 109 Pac. Rep. 879, 880.

Idaho. Powers of Boise City as to construction of sewers under charter, Laws 1907, p. 57: *Boise City N. B. v. Boise City*, 15 Idaho 792, 100 Pac. Rep. 93.

Kansas. Power of municipality to do street work: See *Barnes v. City of Parsons*, 77 Kan. 311, 94 Pac. Rep. 151.

Power of township to construct bridges: See *Rossville Tp., Shawnee County v. Alma N. Bank*, 78 Kan. 773, 98 Pac. Rep. 234.

Oklahoma: Contract for filtration plant exceeding estimates of cost of engineer, void, under statute: *Bowles v. Neely* (April 14, 1911), 115 Pac. Rep. 345.

Oregon. Power to provide water system, not legislative but proprietary: *Tone v. Tillamook City* (Oreg., April 11, 1911), 114 Pac. Rep. 838, 840. See *Esberg C. Co. v. Portland*, 34 Oreg. 282, 55 Pac. Rep. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651.

lic work to the lowest bidder, upon plans and specifications previously adopted, that they must be sufficiently certain and definite, upon all the details of the work which materially affect its cost, to apprise bidders of all the essential and substantial parts of the work and enable them to know with reasonable accuracy the outlay they will have to make in performing the work to be contracted for. This is thoroughly established in the case of public improvements of streets, where the cost is raised by assessment upon the property owners within the district specially benefited thereby.¹⁵

§ 201b. **Same.** The reason for the rule, as applied to such work, is in part because such uncertainty deprives the property owners of the knowledge necessary to enable them to undertake the work themselves, as the statute provides they may, and in part because it deprives bidders of like knowledge, and thereby tends to prevent the fair competition and resulting low cost of the work, which is the principal object of the provision. The latter reason is as persuasive as the first, it is sufficient to support the rule, and it applies as well where the cost is to be paid with money already raised by taxation or by the sale of bonds, as where it is to be raised after the work is done by assessment upon the benefitted property.¹⁶

Washington. Delegation of power of town council to committee:
See *Woldenberg v. Sampson*, 55 Wash. 152, 104 Pac. Rep. 184.

¹⁵ *City S. I. Co. v. Kroh* (Cal., September 2, 1910), 110 Pac. Rep. 933, 937, citing the following cases: *Piedmont P. Co. v. Allman*, 136 Cal. 89, 68 Pac. Rep. 498; *California I. Co. v. Reynolds*, 123 Cal. 92, 55 Pac. Rep. 802; *Grant v. Barber*, 135 Cal. 191, 67 Pac. Rep. 127; *Stansbury v. White*, 121 Cal. 437, 53 Pac. Rep. 940; *Chase v. Scheerer*, 136 Cal. 251, 66 Pac. Rep. 768; *Perine v. Pasadena*, 116 Cal. 9, 47 Pac. Rep. 777; *Warren v. Chandos*, 115 Cal. 385, 47 Pac. Rep. 132.

¹⁶ *City S. I. Co. v. Kroh* (Cal., September 2, 1910), 110 Pac. Rep. 933, 937. See *Santa Cruz etc. Co. v. Broderick*, 113 Cal. 631, 46 Pac. Rep. 863; *Ertle v. Leary*, 114 Cal. 241, 46 Pac. Rep. 1; *American C. Co. v. Licking Co.*, 31 Ohio St. 415; *Detroit v. Hosmer*, 79 Mich., 388, 44 N. W. Rep. 622; *Fones Bros. Co. v. Erb*, 54 Ark. 645, 17 S. W. Rep. 7, 13 L. R. A. 353; *Andrews v. Board*, 7 Idaho 457, 63 Pac. Rep. 592; *Gage v. New York*, 110 App. Div. 403, 97 N. Y. Supp. 157; *McBrian v. Grand Rapids*, 56 Mich. 99, 22 N. W. Rep. 206.

Of the provisions objected to in the case first cited, "the following come within this class and do not invalidate the contract: The con-

Where the property owners consent to an improvement and the issuance of bonds therefor, the proceeding is not strictly in invitum, and the extreme strictness of construction against the validity of contracts made under such circumstances is not required.¹⁷

If a taxpayer endeavors to enjoin the letting of the contract, on the ground that a limitation of the specifications is void and that it tends to discourage bidders and make the work more expensive, possibly the suit may be maintained,

tractor must grade the connections with intersecting roads to the satisfaction of the engineer employed by the commission. He was allowed to take water from the county wells and tanks along the road, but, if that was insufficient, he was required to obtain the necessary quantity from other sources at his own expense. A method of mixing the asphaltic cement was recommended, but any other method was permitted, provided it would result in coating every particle of the stone, sand and dust with the asphaltic cement. If compelled to cease work temporarily, the contractor was required to leave in a passable condition during the winter the part of the road upon which he had worked. The statute limits the width of the roadway made with these funds to 16 feet. Public roads must be at least 40 feet wide. The sole purpose of this clause is to secure a way for public travel, and it would be substantially complied with if the portion of the public road not occupied by the pavement was made fit for that purpose. During the progress of the work he must maintain a roadway for traffic, either alongside the pavement on the highway, or on private land adjoining, 'unless in the judgment of the engineer it is a physical impossibility to do so.' Soft material encountered was to be removed as directed by the engineer. The earth for the embankments and shoulders was to be of a quality satisfactory to the engineer. All of these provisions come within the exception above stated. They do not make the contract void. * * * If soft spots developed under rolling they were to be excavated to a depth of two feet, and then filled with clean dry earth or gravel. The foundation was to be of gravel wherever directed by the engineer, and was to be not less than three inches thick after compacting, or thicker, if so directed by the engineer. The provisions for extra work in excavating the soft spots which might be developed when the heavy roller was applied come within the rule regarding unforeseen contingencies, declared in *Haughawout v. Hubbard* and other similar cases above cited. The specification that the engineer should decide where the gravel foundation should be laid and its thickness is not objectionable, since by the contract the contractor is to be paid for laying such foundation at a fixed price per ton for the amount of gravel used therein. The decision of the engineer could not injuriously affect him." *City S. I. Co. v. Kroh* (Cal., September 2, 1910), 110 Pac. Rep. 933, 937, 938 (other similar points considered).

¹⁷ *City S. I. Co. v. Kroh* (Cal. Sup., September 2, 1910), 110 Pac. Rep. 933, 938. See this case for a number of other points decided relative to the law of public contracts for highway, and issuance of bonds therefor.

or it may be that in a proceeding in invitum, when a stricter rule prevails, where the consent of the taxpayer has not been previously obtained and the money is yet to be raised from them by assessment, such a clause in the specifications will be fatal to the validity of the contract; but where the contract has been let, the work involved in the demand has been performed under it in good faith, and the people have voted the bonds and the money has been realized therefrom, and no facts are shown to indicate that this clause had any effect whatever upon the bids, or concern the character of the improvement to be made, but was collateral thereto, the rule is otherwise.¹⁸

¹⁸ In *People v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. Rep. 802, 60 L. R. A. 768, where a similar case was presented, the court held that the contractor must be presumed to have known that the clause in the specifications was void, and to have made his bid with that understanding, and that he was entitled to payment under the contract, notwithstanding such invalid clause in the specifications and contract. It appeared in that case that the courts had previously decided that the provision was void and that this was actually known to the successful bidder. But the court distinctly declares that the rule would be the same in the absence of such decision.

In *People v. Coler*, 166 N. Y. 1, 59 N. E. Rep. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, a similar clause in the contract was held to be invalid. But it was further held that the contract was not void, and that, when such a contract has been made and has been performed by the contractor, the fact that he has violated the invalid provision is no defense to an action by him to enforce payment of the contract price. The same conclusion was declared in *Chicago v. Hulbert*, 205 Ill. 363, 69 N. E. Rep. 786; *Marshall v. Nashville*, 109 Tenn. 513, 71 S. W. Rep. 815; *Cleveland v. Clements*, 67 Ohio St. 197, 65 N. E. Rep. 885; 59 L. R. A. 775, 93 Am. St. Rep. 670.

"In *Inge v. Board*, 135 Ala. 202, 33 South. Rep. 678, 93 Am. St. Rep. 20, the work had not been performed, and the suit was instituted by taxpayers to restrain its performance. It was an ordinary street improvement proceeding. There was a similar clause in the specifications, and it was held that this prevented fair bidding and made the contract void. The point that it should be presumed to have been disregarded was not raised or considered. We think that the cases first cited above apply the better rule to be followed here. The void provision did not in any respect concern or affect the character of the improvement to be made, but was wholly collateral thereto. The case does not come within the scope of the rule that public corporations are not estopped by benefits received from the actual performance of an ultra vires contract, as in *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, and the numerous cases following the rule there stated. The presumption being that the parties all disregarded the collateral and invalid specification and there being nothing tending to prove or to indicate the contrary, the conclusion logically follows that, so far as this point is concerned, the

§ 201c. Same. Exception. There is a well-recognized exception to the rule first stated, in the case of details of construction which do not appear and can not with reasonable diligence and cost be ascertained in advance, or which will be disclosed only by the doing of the work, or any contingency which reasonable care and consideration would not foresee. Such things may occur in every work of any considerable magnitude, and they must be left to be adjusted in accordance with general provisions of the contract, or by the discretion of the person or board supervising its performance. Examples of such details, and of lawful provisions for their determination, were considered in the cases hereafter cited.¹⁹

§ 202. Same. Owner. Contract not binding, contractor's lien fails. Implied contract.

Additional matter to foot-note 18.²⁰

Additional matter to foot-note 19.²¹

contract was properly awarded and lawfully made": *City S. I. Co. v. Kroh* (Cal., September 2, 1910), 110 Pac. Rep. 933, 941, 942.

California. Specifications as to public safeguards, in street improvement contract, not increasing obligation of contractor: See *Schindler v. Young* (Cal. App.), 108 Pac. Rep. 733.

Examples of matters restricting competitive bidding and avoiding contract:

California. *Stansbury v. Poindexter*, 154 Cal. 709, 99 Pac. Rep. 182; *Blochman v. Spreckles*, 135 Cal. 664, 67 Pac. Rep. 1061, 57 L. R. A. 213; *Clouse v. City of San Diego* (Cal. Sup., March 8, 1911), 114 Pac. Rep. 573, 575.

Kansas. *National S. Co. v. Wyandotte C. & L. Co.*, 76 Kan. 914, 92 Pac. Rep. 1111; s. c., sub. nom. *Atkin v. Wyandotte C. & L. Co.*, 73 Kan. 768, 84 Pac. Rep. 1040.

Oklahoma. *Citizens N. Bank v. Mitchell* (Okl., July 13, 1909), 103 Pac. Rep. 720. See *McMullen v. Hoffman*, 174 U. S. 644, 670, 19 Sup. Ct. 841, 83 L. ed. 1117.

¹⁹ *City S. I. Co. v. Kroh* (Cal., September 2, 1910), 110 Pac. Rep. 933, 937, citing: *Haughwout v. Hubbard*, 131 Cal. 679, 63 Pac. Rep. 1078; *Belser v. Allan*, 134 Cal. 400, 66 Pac. Rep. 492; *Banaz v. Smith*, 133 Cal. 106, 65 Pac. Rep. 309; *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. Rep. 53; *Chase v. Scheerer*, 136 Cal. 251, 66 Pac. Rep. 768; *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. Rep. 924.

²⁰ **Oregon.** *Litherland v. S. Morton Cohn R. E. & I. Co.*, 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

²¹ **Oregon.** See *Litherland v. S. Morton Cohn R. E. & I. Co.*, supra.

§ 203. Same. Owner.Additional matter to foot-note 20.²²**§ 204. Same. Owner. Street-work.**Additional matter to foot-note 25.²³**§ 205. Contract made with reference to statute.**Additional matter to foot-note 27.²⁴**§ 206. Consent.**Additional matter to foot-note 28.²⁵Additional matter to foot-note 33.²⁶**§ 207. Same. Fraud. Mistake.**Additional matter to foot-note 31.²⁷

²² Oregon. See law of privity: Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

See Crane Co. v. Erie H. Co. (Oreg., December 20, 1910), 112 Pac. Rep. 340 for full statement and authorities as to the necessity of authority from the owner, expressly, impliedly or by way of estoppel, for the construction of the improvement; "all authority to bind the owner * * * must emanate from the original contract, which becomes the foundation law for the government of all sub-contracts, as they must be created under it and by virtue of the contractor's authority obtained through it.

²³ California. § 1191 Code Civ. Proc. was not amended by Stats. & Amdts. 1911, p. 1313.

²⁴ Washington. Compare Leidendecker v. Aetna I. Co., 52 Wash. 609, 101 Pac. Rep. 219.

²⁵ California. As to meeting of minds regarding extras: See City S. I. Co. v. Kroh (Cal. Sup., September 2, 1910), 110 Pac. Rep. 933, 940, 941.

Idaho. See Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 83.

²⁶ Idaho. See Nave v. McGrane (Idaho, December 20, 1910), 113 Pac. Rep. 82, 83.

²⁷ Unilateral mistake:

Idaho. See Tatum v. Coast L. Co., 16 Idaho 471, 101 Pac. Rep. 957.

Illinois. See Sternmeyer v. Schroepel, 226 Ill. 9, 80 N. E. Rep. 564, 117 Am. St. Rep. 224, 10 L. R. A. (N. S.), 114.

As to exclusion of certain material to be furnished by contractor:

Oregon. See McInnis v. Buchanan, 53 Oreg. 229, 99 Pac. Rep. 929, 931.

Fraud; statute providing no school district trustee should be interested in contract; contract void: Independence School Dist. v. Collins (Idaho, December 8, 1908), 98 Pac. Rep. 857.

§ 208. Same. Indefiniteness of contract. False reference to plans and specifications.

Additional matter to foot-note 34.²⁸

§ 209. Consideration.

Additional matter to foot-note 38.²⁹

§ 210. Ratification.

Additional matter to foot-note 42.³⁰

§ 211. Definition of "original contract."

Additional matter to foot-note 46.³¹

§ 212. Same. Owner, laborer and material-man.

Additional matter to foot-note 47.³²

§ 213. Same. Subcontractor's contract.

Add to end of paragraph "where the statute requires such record."

Additional matter to foot-note 48.³³

§ 214. Same. Definition of "statutory original contracts" and "non-statutory original contracts."

Additional matter to foot-note 50.³⁴

215. Same. Contract for street-work.

Additional matter to foot-note 51.³⁵

²⁸ See §§ 119 et seq., Architect, this Supplement, ante.

²⁹ **Kansas.** See *Pittsburgh V. P. & B. B. Co. v. Cerebus O. Co.*, 79 Kan. 603, 100 Pac. Rep. 631,

Washington. See *Evans v. Oregon & W. R. Co.*, 58 Wash., 429, 108 Pac. Rep. 5, 7.

³⁰ See § 26, this Supplement, ante.

³¹ **California.** See § 1183 Code Civ. Proc., as amended May 1, 1911, Stats. & Amdts. 1911, p. 1313.

³² See "Owner," generally, §§ 508 et seq., this Supplement, post.

³³ See §§ 66-76, this Supplement, ante.

³⁴ **California.** The amendment of May 1, 1911, to § 1183 Code Civ. Proc., Stats. & Amdts. 1911, p. 1313, abolishes the statutory original contract.

³⁵ **California.** § 1191 Code Civ. Proc. was not changed by the amendments of May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.

CHAPTER XII.

BUILDING CONTRACTS (CONTINUED). CONSTRUCTION OF
SAME. IN GENERAL.

§ 216. Construction of building contracts.

Additional matter to foot-note 1.¹

§ 216a. Contract as personal obligation of contractor.

The contractor's obligation to construct by entering into a building contract is not personal unless the contrary intention appears; and ordinarily a construction contract is binding upon his personal representatives.²

§ 217. Several contracts relating to same matters.

Additional matter to foot-note 3.³

§ 218. Ambiguity or uncertainty in contract.

Additional matter to foot-note 4.⁴

§ 219. Particular clauses. General intent.

Additional matter to foot-note 8.⁵

¹ California. Construction of contract as to powers of engineer, so as to make contract lawful: See *City S. I. Co. v. Kroh*, 158 Cal. 308, 110 Pac. Rep. 933, 938.

New Mexico. "Modern \$30,000 theatre building" in contract, construed: *Neher v. Viviani* (N. M., August 10, 1910), 110 Pac. Rep. 695, 697.

² *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. Rep. 436. See *Billing's Appeal*, 106 Pa. 558, 560; *Dickenson v. Calahan's Admr.*, 19 Pa. 227. And see exhaustive notes in 21 L. R. A. (N. S.), 915 and 68 Am. Dec. 760. See, also § 200 this Supplement, ante.

³ Utah. Compare *Ryan v. Curlew I. & R. Co.* (Utah, September 16, 1909), 104 Pac. Rep. 218, 220.

⁴ Idaho. Contract silent as to amount of excavation; yardage: See *Whiteway v. State* (Idaho, February 13, 1911), 113 Pac. Rep. 98, 101.

As to character of construction, etc.: See *Sanders v. Keller* (Idaho, October 4, 1910), 111 Pac. Rep. 350.

⁵ Colorado. Contract considered as a whole: *Town of Sterling v. Hurd*, 44 Colo. 436, 98 Pac. Rep. 174, 176.

§ 220. Entire and severable contracts.

Additional matter to foot-note 10.⁶

Additional matter to foot-note 11.⁷

§ 221. Dependent and independent promises.⁸

§ 222. Joint and several contracts.

Additional matter to foot-note 17.⁹

§ 223. Contract explained by circumstances.¹⁰

§ 224. Reasonable stipulations, when implied.

Additional matter to foot-note 21.¹¹

⁶ Apportionment of price to each item:

California. Rockwell v. Light, 6 Cal. App. 563, 565, 92 Pac. Rep. 649. See Generally Los Angeles G. & E. Co. v. Amalgamated O. Co., 156 Cal. 776, 106 Pac. Rep. 55.

Kansas. See Bailey v. Fredonia G. Co., 82 Kan. 746, 109 Pac. Rep. 411.

General rule as to single contract: See Tonopah L. Co. v. Nevada A. Co., 30 Nev. 445, 97 Pac. Rep. 636, 638. See Miller v. Batchelder, 117 Mass. 179; Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. Rep. 545.

⁷ Kansas. Contract to drill five wells, held to be severable: Bailey v. Fredonia G. Co., 82 Kan. 746, 109 Pac. Rep. 411. See 59 Am. St. Rep. 279, note; and 20 L. R. A. (N. S.), 1069, note.

⁸ See §§ 220 and 222 Treatise and Supplement.

⁹ Washington. See Bailey M. Works v. Miller (Wash., August 8, 1910), 110 Pac. Rep. 422, 423.

¹⁰ As to liability of owner for delay by act of other original contractor: See Goss v. Northern Pacific H. Assoc., 50 Wash. 236, 96 Pac. Rep. 1078.

By conduct of parties: See City S. I. Co. v. Marysville, 155 Cal. 419, 101 Pac. Rep. 308.

As to term "primings": Rockwell v. Light, 6 Cal. App. 563, 92 Pac. Rep. 649.

Uncertainty as to character of construction: Sanders v. Keller (Idaho, October 4, 1910), 111 Pac. Rep. 350.

Time of essence of contract: See Standard L. Co. v. Miller & Vidor L. Co., 21 Okl. 617, 96 Pac. Rep. 761, 765.

As to estoppel: Minnetonka O. Co. v. Cleveland V. B. Co. (Okl., September 13, 1910), 111 Pac. Rep. 326.

Presenting bill: See James v. Beebe (Wash., July 18, 1910), 109 Pac. Rep. 1032, 1033.

¹¹ As to implied agreement of contractor and owner to remove earth falling on property: See Carlson v. Sheehan, 157 Cal. 692, 697, 109 Pac. Rep. 29.

Usage: See Puritos L. Co. v. Green (Cal. App., March 21, 1911), 115 Pac. Rep. 660.

Additional matter to foot-note 22.¹²

§ 225. Same. Time of performance unspecified.

Additional matter to foot-note 25.¹³

Additional matter to foot-note 27.¹⁴

§ 226. Warranty.

Additional matter to foot-note 29.¹⁵

§ 227. Construction of statutory original contracts.

Additional matter to foot-note 30.¹⁶

No implied covenant that building is to continue in existence: *Watson v. Alta I. Co.*, 12 Cal. App. 560, 565, 108 Pac. Rep. 48; s. c., 12 Cal. App. 566, 108 Pac. Rep. 50.

Implied agreement of contractor to pay bills under agreement to furnish materials and labor: *Covey v. Schlesswohl* (Colo., March 6, 1911), 114 Pac. Rep. 292.

Measurement of material before being placed in situ: *McKivior v. Savage* (Wash., September 19, 1910), 110 Pac. Rep. 811, 813.

Reasonable value of work: *Holm v. Chicago M. & P. S. Ry. Co.* (Wash., July 7, 1910), 109 Pac. Rep. 799, 800.

As to contracts where promisee is to be "satisfied": See *Midgley v. Campbell B. Co.* (Utah, January 4, 1911), 112 Pac. Rep. 820, 824, 825.

"Good and workmanlike manner" construed: See *Holland v. Rhoades* (Oreg., February 8, 1910), 106 Pac. Rep. 779.

13 New Mexico. *Cowles v. Hagerman* (N. M., August 29, 1910), 110 Pac. Rep. 843; s. c., 14 N. M. 422, 94 Pac. Rep. 946. See *Neher v. Viviani* (N. M., August 14, 1910), 110 Pac. Rep. 695.

Washington. *Berlin M. Works v. Miller* (Wash., August 8, 1910), 110 Pac. Rep. 422, 424.

14 New Mexico. *Neher v. Viviani* (N. M., August 10, 1910), 110 Pac. Rep. 695, 697; *Hagerman v. Cowles*, 14 N. M. 422, 94 Pac. Rep. 946; s. c., 110 Pac. Rep. 843.

15 Warranty as to machine: See *International F. Co. v. Caney I. & C. S. Co.* (Kan., May 6, 1911), 115 Pac. Rep. 635; *Berlin M. Works v. Miller* (Wash.), 110 Pac. Rep. 422, 424.

Warranty as to efficiency of heating plant: See *Yundt v. Schlutz-Degginger Co.* (Wash., March 3, 1911), 113 Pac. Rep. 760.

Warranty as to railroad crossing: See *Clemons v. Gray's Harbor & P. S. Ry. Co.* (Wash., April 7, 1911), 114 Pac. Rep. 865.

Warranty, generally: See *Hale v. Van Buren & M. Co.* (Okla.), 103 Pac. Rep. 1026.

16 California. The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.). See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

§ 228. Instances of construction of contracts.

Additional matter to foot-note 33.¹⁷

¹⁷ Construction of contract for development of water: See Garvey W. Co. v. Huntington L. & I. Co., 154 Cal. 232, 97 Pac. Rep. 428. Construction of contract as to grading: See Hill v. Clark, 7 Cal. App. 609, 612, 95 Pac. Rep. 382.

Construction of contract for erection of theatre building: See Neher v. Viviani (N. M., August 10, 1910), 110 Pac. Rep. 695, 698.

CHAPTER XIII.

BUILDING CONTRACTS (CONTINUED). COMMON CLAUSES
PECULIAR TO BUILDING CONTRACTS. IN GENERAL.§ 229. Scope of chapter.¹

§ 230. Arbitration clause. California.

Additional matter to foot-note 2.²Additional matter to foot-note 3.³

§ 231. Same. Agreement to arbitrate not final. The object of arbitration is to put an end to litigation, and it is essential to the validity of the award that it should be final and conclusively determine the matters submitted to the arbitrators, thus leaving nothing to be done but to execute and carry out the terms of the award. This is true both at the common law and under the code.⁴

Additional matter to foot-note 5.⁵

§ 232. Same. When procuring award condition precedent.

Additional matter to foot-note 6.⁶Additional matter to foot-note 7.⁷

¹ See also following chapters, §§ 258 to 314 this Supplement, post.

² Washington. Owen v. Casey, 48 Wash. 673, 94 Pac. Rep. 463.

³ Arbitration clause:

California. See Boyd v. Bargagliotti, 12 Cal. App. 228, 230, 107 Pac. Rep. 150. Compare Dahlberg v. Girsch (Cal.), 107 Pac. Rep. 616.

Colorado. Compare, generally, Empson P. Co. v. Clawson, 43 Colo. 188, 95 Pac. Rep. 546.

Washington. See Owens v. Casey, 48 Wash. 673, 94 Pac. Rep. 473.

⁴ California. Boyd v. Bargagliotti, 12 Cal. App. 228, 238, 107 Pac. Rep. 150.

⁵ Idaho. See Nelson Bennett Co. v. Twin Falls L. & W. Co., on rehearing, 14 Idaho 5, 93 Pac. Rep. 789, 801; s. c., 92 Pac. Rep. 780 (where submission to arbitration is not binding upon both parties, it will not be enforced by the courts).

⁶ California. See Boyd v. Bargagliotti, 12 Cal. App. 228, 238.

Idaho. Compare Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 795, 796, 92 Pac. Rep. 980.

⁷ California. See Burke v. Dittus, 8 Cal. App. 175, 178, 96 Pac. Rep. 330; Coplew v. Durand, 153 Cal. 278, 279, 95 Pac. Rep. 38.

Additional matter to foot-note 8.⁸

§ 233. **Same. Distinction between two classes of cases.**
Additional matter to foot-note 9.⁹

§ 234. **Same. Submission to arbitration revocable.**
Additional matter to foot-note 10.¹⁰

§ 235. **Same. Good faith and open dealings of arbitrators.**
Additional matter to foot-note 11.¹¹

§ 236. **Estimates.** Stipulations in construction contracts that engineers' estimates should be followed have been generally held valid and more binding than the ordinary submission to arbitration, for the reason that such stipulations enter into and become a part of the consideration of the contract, without which it would not in all probability have been made. They are intended to avoid harrassing litigation over questions that can only be determined intelligently by those possessing scientific knowledge.¹²

Washington. Dickerman v. Reeder (Wash., July 23, 1910), 109 Pac. Rep. 1060.

⁸ **Washington.** See Dickerman v. Reeder (Wash., July 23, 1910), 109 Pac. Rep. 1060.

⁹ **Colorado.** See Town of Sterling v. Hurd, 44 Colo. 436, 98 Pac. Rep. 174, 176.

Washington. See Ilse v. Aetna I. Co., 55 Wash. 487, 104 Pac. Rep. 787, 789.

¹⁰ See § 231 this Supplement, ante.

¹¹ **Colorado.** See Town of Sterling v. Hurd, 44 Colo. 436, 98 Pac. Rep. 174, 176; Empson P. Co. v. Clawson, 95 Pac. Rep. 546. See, also, Lamson v. City of Marshall, 133 Mich. 250, 95 N. W. Rep. 78.

Idaho. Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 92 Pac. Rep. 980.

Utah. See Midgley v. Campbell B. Co. (Idaho, January 4, 1911), 112 Pac. Rep. 820.

Washington. Camp v. Neufelder, 49 Wash. 426, 95 Pac. Rep. 640; McKivor v. Savage (Wash., September 19, 1910), 110 Pac. Rep. 811, 812; Sweatt v. Bonne (Wash., September 3, 1910), 110 Pac. Rep. 617; Pinickneff v. Johnson, 54 Wash. 156, 102 Pac. Rep. 1047, 1048.

See, generally, chapter on Architect, §§ 119 et seq., this Supplement, ante.

¹² **California.** City S. I. Co. v. Marysville, 155 Cal. 419, 427, 101 Pac. Rep. 308; Williams v. Chicago etc. Ry. Co., 112 Mo. 487, 20 S. W. Rep. 631, 34 Am. St. Rep. 403.

But the stipulation must be expressed in clear language:

Additional matter to foot-note 14.¹³

§ 237. Liquidated damages.

Additional matter to foot-note 16.¹⁴

Additional matter to foot-note 18.¹⁵

Additional matter to foot-note 19.¹⁶

Oregon. *Williams v. Mount Hood Ry. & P. Co.* (Oreg., August 3, 1910), 110 Pac. Rep. 490, 492; s. c., 111 Pac. Rep. 17.

¹³ **Idaho.** See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 797, 92 Pac. Rep. 980.

Oregon. See *Williams v. Mount Hood Ry. & P. Co.* (Oreg., August 3, 1910), 110 Pac. Rep. 490, 492; s. c., 111 Pac. Rep. 17.

Washington. Estimates not overthrown, except upon evidence of fraud: *McKivior v. Savage* (Wash., December 19, 1910), 110 Pac. Rep. 811, 812; *Pinickneff v. Johnson*, 54 Wash. 156, 102 Pac. Rep. 1047. But see *Young Men's Christian Assoc. v. Gibson*, 58 Wash. 307, 108 Pac. Rep. 766, 769; *Ilse v. Aetna I. Co.*, 55 Wash. 487, 104 Pac. Rep. 787.

14 Liquidated damages:

See § 810 Treatise.

California. See *Boyd v. Bargagliotti*, 12 Cal. App. 228, 238, 107 Pac. Rep. 150; *Hill v. Clark*, 7 Cal. App. 609, 612, 95 Pac. Rep. 382; *Sherman v. Gray*, 11 Cal. App. 348, 104 Pac. Rep. 1004.

Colorado. See *Gillett v. Young*, 45 Colo. 562, 101 Pac. Rep. 766.

Kansas. *St. Louis & S. F. R. Co. v. Gaba*, 78 Kan. 432, 97 Pac. Rep. 435.

New Mexico. See *Thomas v. Gavin* (N. M.), 110 Pac. Rep. 841.

Washington. *Waiver.* See *Erickson v. Green*, 47 Wash. 613, 92 Pac. Rep. 449.

Damages for delay:

California. See *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App., November 23, 1910), 112 Pac. Rep. 892, 894; *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 42, 106 Pac. Rep. 413; *Seebach v. Kuhn*, 9 Cal. App. 485, 490, 99 Pac. Rep. 723.

Colorado. *Gillett v. Young*, 45 Colo. 562, 101 Pac. Rep. 766.

Washington. See *Keenan v. Empire State S. Co.* (Wash., February 20, 1911), 113 Pac. Rep. 636, 638; *Goss v. Northern Pac. H. Assoc.*, 50 Wash. 236, 96 Pac. Rep. 1078.

Damages, generally:

California. See *Gay v. Engrebetson*, 158 Cal. 21, 109 Pac. Rep. 877; s. c., sub. nom., *Engrebetson v. Gay*, 158 Cal. 27, 30, 109 Pac. Rep. 879.

Kansas. See *Fossett v. Rock-Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 838, 839.

Washington. *Dickerman v. Reeder* (Wash., July 23, 1910), 109 Pac. Rep. 1060.

¹⁵ **Kansas.** *Illinois T. & S. B. v. City of Burlington*, 79 Kan. 797, 101 Pac. Rep. 649.

Washington. *Dickerman v. Reeder* (Wash., July 23, 1910), 109 Pac. Rep. 1060.

¹⁶ **Washington.** *Williams v. Lewis N. Rosenbaum Co.*, 57 Wash. 94, 106 Pac. Rep. 493; *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, 1027; *Clemons v. Grays Harbor & P. S. Ry. Co.* (Wash., April 7, 1911), 114 Pac. Rep. 865; *Bell v. Scranton C. M. Co.* (Wash., April 7, 1911), 114 Pac. Rep. 865; *Bloom's Sup.*—7

§ 238. Certificates.

Additional matter to foot-note 20.¹⁷

Additional matter to foot-note 22.¹⁸

Additional matter to foot-note 23.¹⁹

§ 239. Certificate, when excused.

Additional matter to foot-note 25.²⁰

Additional matter to foot-note 26.²¹

§ 240. Waiver of certificate.

Additional matter to foot-note 27.²²

§ 241. Same. Dismissal of architect.

Additional matter to foot-note 30.²³

(Wash.), 110 Pac. Rep. 628. See *Erickson v. Green*, 47 Wash. 613, 92 Pac. Rep. 449, 450; *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. Rep. 165.

¹⁷ *California*. See *City S. I. Co. v. Marysville*, 155 Cal. 419, 432, 101 Pac. Rep. 308. Compare *Watson v. Alta I. Co.*, 12 Cal. App. 560, 103 Pac. Rep. 48.

Certificate of professional architect not required: *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App., November 23, 1910), 112 Pac. Rep. 892, 895.

Washington. See *Young Men's Christian Assoc. v. Gibson*, 58 Wash. 307, 108 Pac. Rep. 766, 767.

¹⁸ *Oregon*. See *McInnis v. Buchanon*, 53 Oreg. 229, 99 Pac. Rep. 929, 930.

Washington. *Sweatt v. Bonne* (Wash., September 3, 1910), 110 Pac. Rep. 617.

¹⁹ *Washington*. *Dickerman v. Reeder* (Wash., July 23, 1910), 109 Pac. Rep. 1060.

²⁰ *Montana*. *Piper v. Murray* (Mont., April 22, 1911), 115 Pac. Rep. 669, 671.

²¹ See Architect, §§ 129a et seq., this Supplement, ante.

California. *Coplew v. Durand*, 153 Cal. 278, 281, 95 Pac. Rep. 38. See *City S. I. Co. v. Marysville*, 155 Cal. 419, 432, 101 Pac. Rep. 308; *Hettinger v. Thiele* (Cal. App., December 13, 1910), 113 Pac. Rep. 121, 123.

Illinois. See *Mantonya v. Reilly*, 83 Ill. App. 275, affirming 84 Ill. 183.

Utah. *Piper v. Murray* (Mont., April 22, 1911), 115 Pac. Rep. 669, 671.

Washington. See *Ilse v. Aetna I. Co.*, 55 Wash. 487, 104 Pac. Rep. 787; *Dickerman v. Reeder* (Wash., July 23, 1910), 109 Pac. Rep. 1060.

²² *Montana*. *Piper v. Murray* (Mont., April 22, 1911), 115 Pac. Rep. 669, 673.

Oregon. *McInnis v. Buchanon*, 53 Oreg. 229, 99 Pac. Rep. 929, 930.

²³ *Montana*. See *Piper v. Murray* (Mont., April 22, 1911), 115 Pac. Rep. 669, 673.

§ 242. Conclusiveness of certificate.Additional matter to foot-note 31.²⁴Additional matter to foot-note 32.²⁵Additional matter to foot-note 33.²⁶

§ 243. Extra work. Generally. The contractor can not abandon the work because the owner will not agree to pay him for extra work, which the contractor is bound to do, under the contract.²⁷

Additional matter to foot-note 35.²⁸**§ 244. Same. Definition.**Additional matter to foot-note 36.²⁹

§ 245. Same. Extra work provided for in contract. Where the consent of the parties to an alteration is secured

²⁴ Washington. As against the sureties of contractor: See *Lazelle v. Empire State S. Co.*, 58 Wash. 589, 109 Pac. Rep. 195, 197.

²⁵ Washington. See *Iise v. Aetna I. Co.*, 55 Wash. 487, 104 Pac. Rep. 787.

²⁶ Progress certificates of the architect are not conclusive, when they are issued with the reservation that the final certificate is to adjust the rights of the parties:

California. *Coplew v. Durand*, 153 Cal. 278, 281, 95 Pac. Rep. 38.

²⁷ California. *Carlson v. Sheehan*, 157 Cal. 692, 698, 109 Pac. Rep. 29.

²⁸ California. Extra work under public contract: See *City S. I. Co. v. Kroh*, 158 Cal. 308, 110 Pac. Rep. 933, 939.

Colorado. Extra work ordered by architect: See *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 919.

Federal. *Fuller & Co. v. Young & Co.*, 126 Fed. Rep. 343, 61 C. C. A. 245.

Idaho. See *Whitney v. State* (Idaho, February 13, 1911), 113 Pac. Rep. 98; *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 803, 92 Pac. Rep. 980.

Kansas. See *City of Hutchinson v. White*, 80 Kan. 37, 101 Pac. Rep. 458, 460; *Smith v. Chicago L. & C. Co.* (Kan., March 11, 1911), 114 Pac. Rep. 372, 374.

Washington. See *Camp v. Neufelder*, 49 Wash. 426, 95 Pac. Rep. 640; *James v. Beebe* (Wash., July 18, 1910), 109 Pac. Rep. 1032; *Yundt v. Schultz-Degginger Co.* (Wash., March 3, 1911), 113 Pac. Rep. 760; *Keenan v. Empire State S. Co.* (Wash., February 20, 1911), 113 Pac. Rep. 636, 638.

²⁹ California. See *City S. I. Co. v. Kroh*, 158 Cal. 308, 110 Pac. Rep. 933, 939, 940.

Utah. *Ryan v. Curlew I. & R. Co.* (Utah, September 16, 1909), 104 Pac. Rep. 218, 219.

Washington. See *James v. Beebe* (Wash., July 18, 1910), 109 Pac. Rep. 1032, 1033.

by a reservation of power in the employer to make such changes inserted in the original contract, the rule must necessarily be the same with respect to the right to compensation for extra work caused thereby, or to a deduction thereby, as when the alteration is made by consent after the work is begun. It is established that in such cases the contractor is entitled to charge and receive the reasonable value or cost of the extra work caused by the alteration. Upon the same principles, it must also be held that the employer or owner is entitled to a reasonable reduction from the contract price, if the changes thus made by authority or consent have materially lessened the amount and cost of the work required by the original contract, and that such deduction should be made at the contract rate for the work omitted, as far as practicable. The rule is thus stated in 3 *Southerland on Damages*, § 709: "It often occurs that a partial rescission results from deviations from the original plan and contract made by deliberate and explicit direction of the employer, or with his consent and acquiescence, and by such departure other work is substituted with other prices agreed to, or implied. In such cases the omission of the particular work excluded by the substitution is not a violation of, but is dispensed with by modifying, the contract. * * * The contractor may then be entitled to recover the contract price with increase or subject to such diminution as is produced by the change of plan, on a quantum meruit."³⁰

The reason of this rule is practically the same as in the numerous cases holding that a slight failure of the contractor to make complete performance is not sufficient to defeat his right to recover the contract price, less a reasonable deduction for the imperfections. This is the rule where imperfections are not fraudulent, but are made by accident

³⁰ *California*. *City S. I. Co. v. Kroh* (Cal., September 2, 1910), 110 Pac. Rep. 933, 940, 941.

The following cases hold that in case the work is materially diminished by such alteration the employer is entitled to have the contract price proportionately reduced: *Holmes v. Stummel*, 17 Ill. 455; *Goldsmith v. Hand*, 26 Ohio St. 107; *Jewett v. Weston*, 11 Me. 349; *White v. Oliver*, 36 Me. 92; *Wright v. Wright*, 11 Ky. 180.

or inadvertence, and are not of sufficient extent to constitute a substantial departure from the original plan. The employer is presumed to agree to take the completed structure as it is, with the implied agreement by the contractor to make the proper deduction from the price, and the recovery is upon the contract, and not upon the quantum meruit.³¹

Additional matter to foot-note 40.³²

§ 246. Same. Contract in writing.

Additional matter to foot-note 42.³³

Additional matter to foot-note 43.³⁴

§ 247. Same. Verbal alteration of written contract.

Additional matter to foot-note 44.³⁵

³¹ *California*. *City S. I. Co. v. Kroh* (Cal., September 2, 1910), 110 Pac. Rep. 933, 940. See *Perry v. Quackenbush*, 105 Cal. 308, 38 Pac. Rep. 740; *Marchant v. Hayes*, 117 Cal. 672, 49 Pac. Rep. 840; *Elliott v. Caldwell*, 48 Minn. 361, 45 N. W. Rep. 845, 9 L. R. A. 52; *Crouch v. Gutmann*, 134 N. Y. 46, 31 N. E. Rep. 271, 30 Am. St. Rep. 608.

"An alteration from the original plan, decreasing the grading under the contract in the case at bar, could not be said to be a breach of the contract, since the contract authorizes it. But, as it does not provide for a decrease of the price corresponding to the decrease in the grading, it would be necessary to resort to the general principles of the law of implied contracts. The county would in that event be entitled to deduct from the contract price for the grading a proportion thereof equal to the proportion which the omitted portion of the work of grading would bear to the whole work, with reasonable allowances to either party for any material variations in the expense of such omitted grading arising from conditions different from the average. This being the rule, the provision for extra work is fair to all parties, and can not be supposed to have had a tendency to prevent competition in bidding": *City S. I. Co. v. Kroh* (Cal., September 2, 1910), 110 Pac. Rep. 933, 940, 941.

³² *Kansas*. See *City of Hutchinson v. White*, 80 Kan. 37, 101 Pac. Rep. 458, 460.

³³ *Kansas*. *City of Hutchinson v. White*, 80 Kan. 37, 101 Pac. Rep. 458, 460.

Montana. See *Piper v. Murray* (Mont., April 22, 1911), 111 Pac. Rep. 669, 671.

³⁴ *Kansas*. *City of Hutchinson v. White*, 80 Kan. 37, 101 Pac. Rep. 458, 460.

Montana. See *Piper v. Murray* (Mont., April 22, 1911), 115 Pac. Rep. 669, 671.

³⁵ *Montana*. See *Piper v. Murray* (Mont., April 22, 1911), 115 Pac. Rep. 669, 671.

Additional matter to foot-note 46.³⁶

§ 248. Same. Estoppel.

Additional matter to foot-note 46.³⁷

§ 249. Same. Arbitration.

Additional matter to foot-note 47.³⁸

§ 250. Same. Void contract.

Additional matter to foot-note 49.³⁹

§ 251. Payments. How considered herein. An agreement to pay a portion of the contract price, "as the work progresses" will be construed in a reasonable manner; and the contractor can not demand certificates from day to day, but only at reasonable intervals.⁴⁰

Additional matter to foot-note 53.⁴¹

§ 252. Same. Condition precedent.

Additional matter to foot-note 55.⁴²

§ 253. Same. Waiver. There is a conflict in the authorities generally as to whether a provision in the contract that

³⁶ *Kansas*. *City of Hutchinson v. White*, 80 Kan. 27, 101 Pac. Rep. 458, 460.

³⁷ *Washington*. See *Holm v. Chicago M. & P. S. Ry. Co.* (Wash., July 7, 1910), 109 Pac. Rep. 799, 800.

³⁸ See §§ 230-235, this Supplement.

³⁹ *California*. The Statutory Original Contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.). See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

⁴⁰ *California*. *Hettinger v. Thiele* (Cal. App.), 113 Pac. Rep. 121. See *Vulcan I. Works v. Cook* (Cal. App., February 10, 1911), 114 Pac. Rep. 995.

⁴¹ *Federal*. See *Fuller & Co. v. Young & Co.*, 126 Fed. Rep. 343, 61 C. C. A. 245.

⁴² *Colorado*. *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 695.

Washington. See *Green v. City of Ballard*, 51 Wash. 149, 98 Pac. Rep. 95.

the contractor shall furnish all labor and materials expressly or by implication requires the contractor to pay therefor.⁴³

§ 254. Same. Application of payments.

Additional matter to foot-note 58.⁴⁴

Additional matter to foot-note 59.⁴⁵

Additional matter to foot-note 60.⁴⁶

§ 255. Liens. Statutory provision. California.

Additional matter to foot-note 61.⁴⁷

§ 256. Same. Condition precedent.

Additional matter to foot-note 62.⁴⁸

§ 257. Same. Public property.

Additional matter to foot-note 63.⁴⁹

⁴³ See authorities cited in *Covey v. Schliesswohl* (Colo., March 6, 1911), 114 Pac. Rep. 292. See *State Board of Agriculture v. Dimick*, 46 Colo. 609, 105 Pac. Rep. 1114, 1115.

⁴⁴ *Oregon*. See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202, 204.

⁴⁵ *Oregon*. See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202, 204.

Washington. See *Bowles v. Fraser* (Wash., July 14, 1910), 109 Pac. Rep. 812.

⁴⁶ *California*. See *San Pedro L. Co. v. Schroeter*, 156 Cal. 158, 161, 103 Pac. Rep. 888.

⁴⁷ *California*. § 1201 Code Civ. Proc. was not amended by Act May 1, 1911, Stats. & Amdts. 1911, pp. 1813 et seq.

⁴⁸ *Colorado*. Provision for furnishing receipted bills construed to mean payment for labor and material: *Covey v. Schliesswohl* (Colo., March 6, 1911), 114 Pac. Rep. 292, 293. See *State Board of Agriculture v. Dimick*, 46 Colo. 609, 618, 105 Pac. Rep. 1114.

Washington. By merely agreeing that he will save the owner harmless from liens, the contractor does not waive his own right to a lien: *Holm v. Chicago M. & P. S. Ry. Co.* (Wash., July 7, 1910), 109 Pac. Rep. 799.

⁴⁹ See § 192, this Supplement, ante.

Oklahoma. See *Jarrell v. Block*, 19 Okl. 467, 92 Pac. Rep. 167, 168.

CHAPTER XIV.

BUILDING CONTRACTS (CONTINUED). NON-STATUTORY ORIGINAL CONTRACTS.

§ 258. Method of treatment.

Additional matter to foot-note 1.¹

§ 259. Statutory and non-statutory original contracts compared. Where a person termed the "contractor" is to receive a certain percentage of the cost of construction and is merely to act as the common-law agent of the owner, his contract is not a statutory original contract, even if the amount of the contract price is more than one thousand dollars;² and likewise, where the supposed "contractor" is merely an employee of the owner, such as his carpenter,³ or his architect.⁴

Additional matter to foot-note 7.⁵

§ 260. Same. Implied contract. The provisions of the statute with reference to the statutory original contract are not to be extended to any contract not falling strictly within the letter of the law.⁶

Additional matter to foot-note 8.⁷

¹ California. While the statutory original contract has been abolished under the act of May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq., and under that act the "original contract" is required to be filed with the statutory bond to limit the liability of the owner to the value of the work performed and materials furnished, it would seem that decisions indicating what is an "original contract" thus required to be filed would be applicable.

² California. Needham v. Chandler, 8 Cal. App. 124, 126, 96 Pac. Rep. 325. See Loma Prieta L. Co. v. Hinton, 12 Cal. App. 766, 108 Pac. Rep. 528.

³ California. Farnham v. California S. D. & T. Co., 8 Cal. App. 266, 271, 96 Pac. Rep. 788.

⁴ California. See Loma Prieta L. Co. v. Hinton, 12 Cal. App. 766, 108 Pac. Rep. 528.

⁵ California. See Lucas v. Gobbi, 10 Cal. App. 648, 103 Pac. Rep. 157.

⁶ California. Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 518, 97 Pac. Rep. 414, 420.

⁷ California. See Farnham v. California S. D. & T. Co., 8 Cal. App. 266, 271, 96 Pac. Rep. 788.

§ 261. Same. Contract price less than one thousand dollars.

Additional matter to foot-note 11.⁸

§ 262. Same. Contract price computable.

Additional matter to foot-note 14.⁹

§ 263. What in no event a statutory original contract.

Additional matter to foot-note 15.¹⁰

§ 264. Provisions not applicable to non-statutory original contracts.

Additional matter to foot-note 17.¹¹

§ 265. Same. Writing. Filing. Payments.

Additional matter to foot-note 17.¹²

§ 266. Same. Notice to owner. Premature payments.

Additional matter to foot-note 24.¹³

§ 267. Same. Payment in land.

Additional matter to foot-note 27.¹⁴

§ 268. Same. Alteration of contract. Conspiracy.

Additional matter to foot-note 28.¹⁵

⁸ California. See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 518, 97 Pac. Rep. 414, 420; *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 271, 96 Pac. Rep. 788.

Conflict of evidence as to whether contract was for one thousand dollars, assailed, finding upheld: See *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

⁹ California. See *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 272, 96 Pac. Rep. 788.

¹⁰ California. See *Loma Prieta L. Co. v. Hinton*, 12 Cal. App. 766, 103 Pac. Rep. 528.

¹¹ California. See § 258, this Supplement, ante, note.

¹² California. See § 258, this Supplement, ante, note.

¹³ California. See Notice to Owner, §§ 526 et seq., this Supplement, post.

¹⁴ California. See § 258, this Supplement, ante, note.

¹⁵ California. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. Rep. 154, 159; but a new oral agreement, superseding and substituted for those existing, and sufficient in itself as a contract, is not within the rule: *Pearsall v. Henry*, supra.

CHAPTER XV.

BUILDING CONTRACTS (CONTINUED). STATUTORY ORIGINAL CONTRACTS.

A. Statutory Requirements not Essential to the Validity of the Whole Statutory Original Contract.

§ 269. Provisions imposing a penalty. Payments, in
general. Statutory provision.

Additional matter to foot-notes 1 and 2.¹

§ 270. Same. Scope and object of these provisions.

Additional matter to foot-note 4.²

§ 271. Same. Substantial compliance required. Effect.

Additional matter to foot-note 6.³

Additional matter to foot-note 12.⁴

§ 272. Same. Contract price not to be payable in ad-
vance of work.

Additional matter to foot-note 13.⁵

¹ **California.** These provisions are not in the act amending § 1184 Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq., which, however, provides for a lien for the value of the labor done and materials furnished, independently of the contract between the owner and the original contractor, when the original contract and the statutory bond are not filed, in accordance with the requirements of § 1183.

² **California.** See § 269, this Supplement, ante, note.

³ **California.** Substantial compliance required: Merced L. Co. v. Bruschi, 152 Cal. 372, 374, 92 Pac. Rep. 844; Barrett-Hicks Co. v. Glas, 99 Pac. Rep. 857, 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 769; s. c., sub nom., Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

⁴ **California.** D. I. Nofziger L. Co. v. Solomon, 13 Cal. App. 621, 110 Pac. Rep. 474, 476; Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 524, 526, 97 Pac. Rep. 414, 420. See Smith v. Dryden (Cal. App., March 10, 1911), 115 Pac. Rep. 455; Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 945, 99 Pac. Rep. 856, 111 Pac. Rep. 769; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

Colorado. See Foley v. Coon, 41 Colo. 432, 93 Pac. Rep. 13, 14.

⁵ See § 269, this Supplement, ante, note.

§ 273. Same. Contract price payable in installments, or after completion.

Additional matter to foot-note 16.⁶

§ 274. Same. Payment of twenty-five per cent thirty-five days after completion. The legislature deemed this reservation of twenty-five per cent, under the statute as it stood at the time, a sufficient compliance with the constitutional provision, and it was thought that the legislature had gone as far as it could be expected to go for the protection of the owner, when it declared this twenty-five per cent of the contract price to be sufficient to cover the full value of the labor done and material furnished for the building.⁷

Additional matter to foot-notes 24 and 25.⁸

§ 275. Same. Object of provision.

Additional matter to foot-note 27.⁹

§ 276. Same. General rule.

Additional matter to foot-note 29.¹⁰

⁶ California. See *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476.

See § 269, this Supplement, ante, note.

⁷ California. *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476; *Hampton v. Christensen*, 148 Cal. 729, 737, 84 Pac. Rep. 200, 203.

The statutory original contract was abolished by the act of May 1, 1911, Stats. & Amdts. 1911, pp. 1813 et seq. See §§ 258 and 269, this Supplement, ante, notes.

⁸ California. *Merced L. Co. v. Bruschi*, 152 Cal. 372, 374, 92 Pac. Rep. 844; *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476; *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 233, 101 Pac. Rep. 691; *Burnett v. Glas*, 154 Cal. 249, 256, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 769.

⁹ California. See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 524, 526, 97 Pac. Rep. 414, 420. See §§ 258, 269 and 274, this Supplement, ante, notes.

¹⁰ California. See *Merced L. Co. v. Bruschi*, 152 Cal. 372, 374, 92 Pac. Rep. 844; *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 769; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423; *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476. See §§ 258, 269 and 274, this Supplement, ante, notes.

§ 277. Same. Illustrations. Sufficient compliance.

Additional matter to foot-note 30.¹¹

Additional matter to foot-note 33.¹²

§ 278. Same. What not substantial compliance. A provision of the statutory original contract that the final payment of twenty-five per cent should be made at the completion of the building is an insufficient compliance with the statute, as it existed before the amendment of 1911.¹³ Likewise a provision for reserving only twenty per cent of the contract price.¹⁴

§ 279. Same. Provision as to liens.

Additional matter to foot-note 36.¹⁵

§ 280. Same. Payment in money.

Additional matter to foot-note 37.¹⁶

§ 281. Same. Contractor's bond. Provision unconstitutional.

Additional matter to foot-note 43.¹⁷

¹¹ *California*. But if amount payable at completion, otherwise: See *Merced L. Co. v. Bruschi*, 152 Cal. 372, 374, 92 Pac. Rep. 844.

¹² *California*. But otherwise, if there is a reservation of only twenty per cent. of the contract price: *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476; *Burnett v. Glas*, 154 Cal. 249, 256, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 769;

Even though there be an unrevealed intention to retain, or an actual retention of the whole twenty-five per cent. of the contract price (the failure to state the proper amount not being due to a mistake of law): *D. I. Nofziger L. Co. v. Solomon*, supra.

¹³ *California*. *Merced L. Co. v. Bruschi*, 152 Cal. 372, 374, 92 Pac. Rep. 844.

¹⁴ *California*. *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476; *Burnett v. Glas*, 154 Cal. 249, 256, 97 Pac. Rep. 423; see s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 769.

¹⁵ *California*. See §§ 258, 269 and 274, this Supplement, ante, notes.

¹⁶ *California*. Statutory original contract abolished by Act May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq. See §§ 258, 269 and 274, this Supplement, ante, notes.

¹⁷ *California*. The act of May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq., amending § 1183 Code Civ. Proc., provides for a contractor's bond to be filed with the contract, otherwise the property to a lien

§ 282. Same. Effect of giving bond. Common-law obligation.

Additional matter to foot-note 49.¹⁸

Additional matter to foot-note 51.¹⁹

§ 283. Same. Previous decisions concerning bond.

Additional matter to foot-note 56.²⁰

for the reasonable value of the labor done and material furnished for the building. Such bond by its terms must inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in the contract.

See Oklahoma note, post, this section.

See Constitutional Aspects, § 39, and §§ 258, 269, and 274, this Supplement, ante.

Statutory bond given besides common law bond, on contract: See City S. I. Co. v. Kroh, 158 Cal. 308, 110 Pac. Rep. 933, 938; Goldtree v. City of San Diego, 8 Cal. App. 505, 508, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Kansas. Statutory bond to release liens; held insufficient, not being conditioned "for the payment of all claims which may be the basis of liens," as required by the statute, where the bond recites that it secures the owner against "claims arising from the furnishing of labor or material for the purposes hereinbefore recited," which purposes are limited to the erection of one certain building: Deatherage L. Co. v. Miles (Kan., July, 1911), 116 Pac. Rep. 605.

Montana. Distinction between statutory undertaking and statutory bond: See Dear Lodge County v. United States F. & G. Co. (Mont., December 6, 1910), 112 Pac. Rep. 1060, 1062.

Oklahoma. Statutory bond under § 4829, Wilson's Rev. & Ann. St. 1903, to prevent attachment of liens: See Daman v. Chamberlain (Okl., July 12, 1910), 110 Pac. Rep. 1056. Compare Clark v. Bank of Hennessey, 14 Okl. 572, 79 Pac. Rep. 217.

"To inure" means to take or have effect; to serve to the use, benefit or advantage of a person: Mean v. Collison (Okl., May 9, 1911), 116 Pac. Rep. 195.

Washington. Compare Jensen v. Sheard, 49 Wash. 593, 96 Pac. Rep. 2; Sheard v. United States F. & G. Co., 58 Wash. 29, 107 Pac. Rep. 1024.

¹⁸ **Colorado.** Statutory bond, without consideration, given on public contract; void: See State Board of Agriculture v. Dimick, 46 Colo. 609, 105 Pac. Rep. 1114, 1115.

¹⁹ **California.** See §§ 258, 269, 274 and 281, this Supplement, ante, notes.

Washington. Statutory bond given under § 5925, Ballinger's Ann. C. & S. (§ 6121 Pierce's Code); time of filing notice: See Cascade L. Co. v. Aetna I. Co., 56 Wash. 503, 106 Pac. Rep. 158; Minneapolis S. & M. Co. v. Aetna I. Co., 56 Wash. 699, 106 Pac. Rep. 160. See also, Franzloll v. Thompson, 55 Wash. 259, 104 Pac. Rep. 278, 280; Griffith v. Rundle, 23 Wash. 453, 63 Pac. Rep. 199, 55 L. R. A. 381.

²⁰ **Bond given under statute on public work:** See § 626 Treatise and this Supplement.

Colorado. See State Board of Agriculture v. Dimick, 46 Colo. 609, 105 Pac. Rep. 1114.

Additional matter to foot-note 59.²¹

§ 284. Provisions avoiding certain clauses. Impairment of liens. Statutory provision.

Additional matter to foot-note 60.²²

§ 285. Same. Provision, when not applicable.

Additional matter to foot-note 62.²³

²¹ Washington. Act 1893, c. xxiv., p. 32, § 1: See, explaining cases cited in note of Treatise, *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. Rep. 869, 102 Pac. Rep. 766.

²² California. § 1201 Code Civ. Proc. was not amended by act May 1, 1911, Stats. and Amdts. 1911, pp. 1813 et seq.

²³ California. See note to preceding section.

CHAPTER XVI.

BUILDING CONTRACTS (CONTINUED). STATUTORY
ORIGINAL CONTRACTS.**B. Statutory Requirements Essential to Validity of Contract.****§ 286. Scope of discussion.**Additional matter to foot-note 2.¹**§ 287. Statutory provision.**Additional matter to foot-note 3.²**§ 288. What not essential to validity of contract.**Additional matter to foot-note 5.³

¹ See §§ 211, 214, 258, 269, 274 and 281, this Supplement, ante, notes.

California. The statutory original contract was abolished by act May 1, 1911, Stats. & Amdts. 1911, pp. 1813 et seq.

² **California.** The statutory original contract as above stated was omitted in the amendment to § 1183 Code Civ. Proc., of May 1, 1911, Stats. & Amdts. 1911, pp. 1813 et seq.

See §§ 211, 214, 258, 269, 274 and 281, this Supplement, ante, notes.

³ **California.** See §§ 286 and 287, this Supplement, ante, notes. While the amendment of § 1183, Stats. & Amdts. 1911, pp. 1813 et seq., does not declare the original contract invalid, if not filed, the effect of the failure to file the original contract and the statutory bond required by the amendment of 1911, is the same as before this amendment, so far as the lien claimants other than the original contractor are concerned. Under the provisions of the old law requiring the statutory original contract to be filed, such subclaimants had a lien for the value of the material furnished and used in the structure and for the labor thereon, without regard to the contract price, when such contract was not filed as required by the statute, or when the provisions required concerning the statutory original contract were not substantially complied with. There does not, therefore, seem to be any essential change made in the new statute, so far as the liability of the owner's property to respond to liens is concerned. The change seems to be one of form merely. The old law required the owner to do certain things to have the liens limited to the contract price; and the change simply requires him to do certain other things to apparently have the same effect. It is true that the language of the new law is not free from some question with regard to this, as in one clause of § 1183 Code Civ. Proc., as thus amended, such limitation of the recovery as against the owner's property is apparently left to the

Additional matter to foot-note 7.⁴

§ 289. Construction of provision.

Additional matter to foot-note 9.⁵

§ 290. Statutory original contract must be entered into before work is commenced.

Additional matter to foot-note 10.⁶

§ 291. Same. Estoppel as to invalidity of contract.

Additional matter to foot-note 11.⁷

§ 292. The statutory original contract must be in writing.

Additional matter to foot-note 14.⁸

Additional matter to foot-note 15.⁹

§ 293. The statutory original contract must be subscribed.

Additional matter to foot-note 18.¹⁰

discretion of the Court, "where it would be equitable to do so"; but other clauses in the same section limit the aggregate liens to the contract price, upon compliance with the provisions of the statute, without reference to any such power of the court. See also, however, in this connection, § 14 of the act, declaring the intent to make the lien "direct." It is to be noted that the provisions of the law, as amended, apply to all contracts, whether the price is more than one thousand dollars or not.

⁴ **California.** But see *D. I. Nofziger L. Co. v. Waters*, 10 Cal. App. 89, 92, 101 Pac. Rep. 38.

⁵ **California.** Substantial compliance: *Hubbard v. Lee*, 6 Cal. App. 602, 606, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528; *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 518, 97 Pac. Rep. 414, 420. Compare *Merced L. Co. v. Bruschi*, 152 Cal. 372, 374, 92 Pac. Rep. 844; *Burnett v. Glas*, 154 Cal. 249, 255, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760.

See § 276, this Supplement, ante.

⁶ **California.** Unless filed before work is commenced statutory original contract is void: *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

⁷ **Plans and specifications**, see *Architect*, §§ 129a et seq., this Supplement, ante.

⁸ **Plans and specifications**, see §§ 129a et seq., this Supplement, ante.

California. Statutory original contract abolished by Stats. & Amdts. 1911, pp. 1313 et seq. See also §§ 211, 214, 258, 269, 281, 288, this Supplement, ante, and notes.

⁹ **Washington.** Building to be an "exact duplicate" of another: See *Jones v. Nelson* (Wash., December 12, 1910), 112 Pac. Rep. 88.

¹⁰ **California.** See notes to preceding section.

§ 294. Filing contract.Additional matter to foot-note 20.¹¹Additional matter to foot-note 21.¹²Additional matter to foot-note 23.¹³**§ 295. The duty of filing the contract.**Additional matter to foot-note 28.¹⁴**§ 296. Necessity and object of filing contract.**Additional matter to foot-note 30.¹⁵**§ 297. Whole contract must be filed.**Additional matter to foot-note 32.¹⁶Additional matter to foot-note 33.¹⁷

¹¹ **Duty of officer to index, and delay in recording or indexing:** See Covington v. Fisher, 22 Okl. 207, 97 Pac. Rep. 615, 617; Poplin v. Mundell, 27 Kan. 138.

¹² **California.** Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 518, 97 Pac. Rep. 414, 420.

¹³ **California.** If statutory original contract or memorandum not filed, contract void: Lucas v. Rea, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537; Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423; Hoffman-Marks Co. v. Spires, 154 Cal. 111, 117, 97 Pac. Rep. 152. See Baker v. Lake L. C. & I. Co., 7 Cal. App. 482, 483, 94 Pac. Rep. 773.

Colorado. See Foley v. Coon, 41 Colo. 432, 93 Pac. Rep. 13, 14, as to failure to file statutory original contract.

¹⁴ **California.** See Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 519, 97 Pac. Rep. 414, 420.

See § 288, this Supplement, ante, note.

¹⁵ **California.** It is intended for the protection of subclaimants: Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 519, 97 Pac. Rep. 414, 420.

See § 288, this Supplement, ante, note.

¹⁶ **California.** See § 288, this Supplement, ante; and § 299, this Supplement, post.

Modifications of the statutory original contract, if not filed with recorder, are of no effect: Barrett-Hicks Co. v. Glas, 99 Pac. Rep. 857, 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., 111 Pac. Rep. 760; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

As to modifications of original contract, under amendment of § 1183, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq., see statute, and §§ 326 et seq., this Supplement, post.

¹⁷ **California.** See Hartwell v. Ganahl L. Co., 8 Cal. App. 733, 737, 97 Pac. Rep. 901.

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§ 298. Same. Reference to matters dehors the contract.

Additional matter to foot-note 34.¹⁸

Additional matter to foot-note 35.¹⁹

§ 299. Same. Where the plans and specifications are referred to. Under provisions of law requiring the statutory original contract to be filed, if the plans and specifications are attached to the contract at the time that they are filed and are filed with it, although subsequently separated, the statute has been complied with, so far as the matter of filing is concerned.²⁰

No oral evidence can be received to show that the plans and specifications were intended by the parties to form a part of the statutory original contract. It is a question of identification as to the various parts of the contract filed. If it can be determined from an inspection of the writing, without resort to parol testimony what the parties intended to rely upon as their guide in the performance of the things to be done, and if the instrument, as a whole, makes certain what the intention was, it will suffice, and no omission which does not cause uncertainty, or tend to mislead, will be allowed to stand in the way of upholding the contract without resort to parol evidence.²¹

Additional matter to foot-note 36.²²

¹⁸ *California*. See *Hartwell v. Ganahl L. Co.*, 8 Cal. App. 733, 736, 97 Pac. Rep. 901.

¹⁹ *Washington*. Building to be an "exact duplicate of another"; See *Jones v. Nelson* (Wash., December 12, 1910), 112 Pac. Rep. 88.

²⁰ *California*. *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 117, 97 Pac. Rep. 152.

²¹ *California*. *Coghlan v. Quartararo*, 115 Pac. Rep. 664, 666.

The pertinency of the decisions in this chapter will appear upon examination of the amendment of May 1, 1911, to § 1183, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1813 et seq., which still requires the owner to file the original contract, if he desires to limit the liability of his property, upon foreclosure of liens, to the contract price.

²² *California*. Plans and specifications, when part of the statutory original contract, must be filed with it: *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537; *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423; *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 117, 97 Pac. Rep. 152; *Patten & Davies L. Co. v. Gibson*, 9 Cal. App. 23, 98 Pac. Rep. 37.

Additional matter to foot-note 37.²³

Additional matter to foot-note 38.²⁴

Additional matter to foot-note 39.²⁵

Additional matter to foot-note 41.²⁶

§ 300. Memorandum of contract. Statutory provision.

Additional matter to foot-note 43.²⁷

§ 301. Same. Effect of provision.

Additional matter to foot-note 44.²⁸

§ 302. Same. Purpose and object.

Additional matter to foot-note 46.²⁹

§ 303. Same. What not required in memorandum.

Additional matter to foot-note 47.³⁰

**§ 304. Same. Contract, or copy thereof, as memorandum.
General principles.**

Additional matter to foot-note 49.³¹

§ 305. Same. Names of all the parties to the contract.

Additional matter to foot-note 51.³²

²³ *California*. *Burnett v. Glas*, 154 Cal. 249, 255, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760.

²⁴ *California*. *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 859; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

²⁵ *Burnett v. Glas*, *supra*.

²⁶ *California*. *Barrett-Hicks Co. v. Glas*, *supra*.

²⁷ *California*. The memorandum of contract is abolished under the amendment of 1911, Stats. & Amdts. 1911, pp. 1313 et seq. See §§ 211, 214, 258, 269, 274, 281 and 288, this Supplement, ante, and notes.

²⁸ *California*. *Burnett v. Glas*, 154 Cal. 249, 255, 256, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760.

See note to preceding section.

²⁹ See § 300, this Supplement, ante, note.

³⁰ See § 300, this Supplement, ante, note.

³¹ See § 300, this Supplement, ante, note.

³² See § 300, this Supplement, ante, note.

§ 306. **Same. Description of the property to be affected thereby.**

Additional matter to foot-note 52.³³

§ 307. **Same. Statement of the general character of the work to be done.**

Additional matter to foot-note 56.³⁴

§ 308. **Same. Statement of work. General principles.**

Additional matter to foot-note 59.³⁵

§ 309. **Same. Reference to plans and specifications.**

Additional matter to foot-note 64.³⁶

Additional matter to foot-note 66.³⁷

§ 310. **Same. Reference to detail drawings.**

Additional matter to foot-note 70.³⁸

§ 311. **Same. Payments.**

Additional matter to foot-note 73.³⁹

§ 312. **Time of filing contract or memorandum.**

Additional matter to foot-note 75.⁴⁰

§ 313. **Place of filing contract or memorandum.**

Additional matter to foot-note 80.⁴¹

³³ See § 300, this Supplement, ante, note.

³⁴ See § 300, this Supplement, ante, note.

³⁵ See § 300, this Supplement, ante, note.

³⁶ *California*. *Burnett v. Glas*, 154 Cal. 249, 255, 256, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760.

See Plans and Specifications, §§ 129c et seq., this Supplement.

³⁷ *California*. *Burnett v. Glas*, supra.

³⁸ See § 301, this Supplement, ante. See, also, Plans and Specifications, §§ 129a et seq., this Supplement.

³⁹ See § 301, this Supplement, ante, as to abolition of memorandum.

⁴⁰ *California*. See § 300, this Supplement, ante, as to memorandum, under amendment of § 1183, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq. And see, as to statutory original contract, §§ 211, 214, 258, 269, 274, 281 and 288, this Supplement, ante.

⁴¹ *California*. See note to preceding section.

§ 314. Conspiracy as to contract price.

Additional matter to foot-note 81.⁴²

⁴² **California.** The provision quoted in the Treatise was omitted from § 1202, under the amendment of May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.

CHAPTER XVII.

BUILDING CONTRACTS (CONTINUED).

C. Effect of Validity or Invalidity of Statutory Original Contract.

§ 315. Effect of validity of contract. Owner's liability.

Additional matter to foot-note 2.¹

Additional matter to foot-note 4.²

§ 318. Same. Valid contract as notice.

Additional matter to foot-note 5.³

§ 317. Same. Abandonment of contract. Where the value of the work done and materials furnished at the time of abandonment, measured by the standard of the whole contract price is less than the payments already made to the contractor, there is no balance applicable to the payment of lien claims, under the statutory original contract.⁴

Additional matter to foot-note 9.⁵

Additional matter to foot-note 10.⁶

¹ California. Stockton L. Co. v. Schuler, 155 Cal. 411, 412, 101 Pac. Rep. 307; D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 92, 101 Pac. Rep. 38; Hoffman-Marks Co. v. Spires, 154 Cal. 111, 115, 97 Pac. Rep. 152. See C. Scheerer & Co. v. Deming, 154 Cal. 138, 97 Pac. Rep. 155.

² California. See Stockton L. Co. v. Schuler, 155 Cal. 411, 413, 101 Pac. Rep. 307.

³ Compare National S. Co. v. Wyandotte C. & L. Co., 76 Kan. 914, 92 Pac. Rep. 111; s. c., sub nom. Atkin v. Wyandotte C. & L. Co., 73 Kan. 768, 84 Pac. Rep. 1040.

⁴ California. Hoffman-Marks Co. v. Spires, 154 Cal. 111, 118, 97 Pac. Rep. 152.

See § 358, this Supplement, post.

⁵ California. C. Scheerer & Co. v. Deming, 154 Cal. 138, 141, 97 Pac. Rep. 155. See Hoffman-Marks Co. v. Spires, 154 Cal. 111, 115, 97 Pac. Rep. 152; Steiger T. C. & P. Works v. City of Sonoma, 9 Cal. App. 698, 703, 704, 100 Pac. Rep. 714.

⁶ California. Stockton L. Co. v. Schuler, 155 Cal. 411, 412, 101 Pac. Rep. 307; D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 92, 101 Pac. Rep. 38; H. Raphael Co. v. Grote, 154 Cal. 137, 97 Pac. Rep. 155. See Hoffman-Marks Co. v. Spires, 154 Cal. 111, 115, 97 Pac. Rep. 152;

§ 318. Same. How far subclaimants are bound by other terms of valid original contract.⁷

Additional matter to foot-note 11.⁸

Additional matter to foot-note 13.⁹

§ 319. Effect of invalidity of statutory original contract. Generally.

Additional matter to foot-note 18.¹⁰

§ 320. Same. Classes affected by invalidity of contract.

Additional matter to foot-note 20.¹¹

Additional matter to foot-note 21.¹²

Additional matter to foot-note 23.¹³

§ 321. Same. Effect as between parties to the contract.
It has more recently been held in California, under the provisions of the statute regarding the statutory original

Steiger T. C. & P. Works v. City of Sonoma, 9 Cal. App. 698, 703, 704, 100 Pac. Rep. 714; *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616.

⁷ *California*. See *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 141, 97 Pac. Rep. 153; *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 115, 97 Pac. Rep. 152; *McCue v. Jackman*, 7 Cal. App. 703, 95 Pac. Rep. 673.

See § 1183, Code Civ. Proc., as amended, Stats. & Amdts. 1911, pp. 1313 et seq.

As to lien for balance of contract price remaining in the hands of the owner: See *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

⁸ *Washington*. See *Gate City L. Co. v. City of Montesano (Wash.)*, 111 Pac. Rep. 799.

⁹ *California*. See *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, 97 Pac. Rep. 152, explaining *Hampton v. Christensen*, 148 Cal. 729, 735, 84 Pac. Rep. 200.

¹⁰ *California*. See *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 483, 94 Pac. Rep. 773; *Hubbard v. Lee*, 6 Cal. App. 602, 606, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528; *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 518, 97 Pac. Rep. 414, 420.

Statutory original contract abolished by Stats. & Amdts. 1911, pp. 1313 et seq. See §§ 214, 258, 269, 274, 281, 283, this Supplement, ante, and notes.

¹¹ *California*. *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 519, 97 Pac. Rep. 414, 420.

See note to preceding section.

¹² *California*. See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 524, 526, 97 Pac. Rep. 414, 420.

¹³ *California*. *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 518, 519, 97 Pac. Rep. 414, 420.

contract, since abolished, that the failure to file such contract does not affect the contractual rights of the parties in any manner; that it only affects the funds from which the claimants' demands may be paid after a judgment is obtained and the right of lien established; that the lien law does not permit a judgment for any more than the lien claimants agreed to take. The contract is valid as between the parties, but not as to lien claimants establishing their liens. Such void contract was held by the Appellate Court to be the measure of compensation and the measure of the test of the contractor's right of recovery; but on rehearing in the Supreme Court, the latter Court withheld its approval of the doctrine that the original contractor can recover on an unfiled statutory original contract, deeming the decision of the question unnecessary.¹⁴

Additional matter to foot-note 25.¹⁵

Additional matter to foot-note 27.¹⁶

§ 322. Same. Contractor's lien on express or implied contract.

Additional matter to foot-note 31.¹⁷

§ 323. Same. To what extent contract may be looked to by the parties. As between the original contractor and

¹⁴ *California*. Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 524, 526, on rehearing in Supreme Court, 97 Pac. Rep. 414, 420; Lacy Mfg. Co. v. Los Angeles G. & E. Co., 12 Cal. App. 37, 42, 106 Pac. Rep. 413.

¹⁵ *California*. Coghlan v. Quartararo (Cal. App., March 21, 1911), 115 Pac. Rep. 664, 666; Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520, 526, 97 Pac. Rep. 414, 420; on hearing in Supreme Court, 97 Pac. Rep. 420; Baker v. Lake E. C. & I. Co., 7 Cal. App. 482, 483, 94 Pac. Rep. 773; Smith v. Dryden (Cal. App., March 10, 1911), 115 Pac. Rep. 455. See Burnett v. Glas, 154 Cal. 255, 97 Pac. Rep. 423; s. c., sub nom. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. Rep. 856.

¹⁶ *California*. Los Angeles P. B. Co. v. Higgins, supra.

¹⁷ *California*. Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520, 526, 97 Pac. Rep. 414, 420, on hearing in Supreme Court, 97 Pac. Rep. 420.

California. Statutory original contract abolished by Stats. & Amdts. 1911, pp. 1313 et seq. See §§ 214, 258, 269, 274, 281, 288, this Supplement, ante, and notes.

the owner, it is now held that the contract becomes the basis of recovery.¹⁸

Additional matter to foot-note 34.¹⁹

Additional matter to foot-note 35.²⁰

§ 324. Same. Lien claimants, other than original contractor. The effect of the failure of the contractor or owner to file the statutory original contract was to render the contract void as a limitation of the liability of the owner to the claimants under the original contractor.²¹

Additional matter to foot-note 37.²²

Additional matter to foot-note 38.²³

Additional matter to foot-note 39.²⁴

Additional matter to foot-note 40.²⁵

Additional matter to foot-note 41.²⁶

Additional matter to foot-note 43.²⁷

Additional matter to foot-note 45.²⁸

¹⁸ *California*. Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520, 526, 97 Pac. Rep. 414, 420; on hearing in Supreme Court, 97 Pac. Rep. 420. See § 321, this Supplement, ante.

¹⁹ *California*. See Los Angeles P. B. Co. v. Higgins, supra.

²⁰ *California*. Los Angeles P. B. Co. v. Higgins, supra.

²¹ *California*. Los Angeles P. B. Co. v. Higgins, supra. See § 321, this Supplement, ante.

²² *California*. D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 92, 101 Pac. Rep. 38; Baker v. Lake L. C. & I. Co., 7 Cal. App. 482, 483, 94 Pac. Rep. 733; Barrett-Hicks Co. v. Glas, 99 Pac. Rep. 857, 859; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

²³ *California*. Smith v. Dryden (Cal. App., March 10, 1911), 115 Pac. Rep. 455.

²⁴ *California*. D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 92, 101 Pac. Rep. 38; Hubbard v. Lee, 6 Cal. App. 602, 606, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

²⁵ *California*. Hubbard v. Lee, supra.

²⁶ *California*. See Merced L. Co. v. Bruschi, 152 Cal. 372, 374, 92 Pac. Rep. 844.

²⁷ *California*. See Lucas v. Rea, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537; Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

²⁸ *California*. D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 92, 101 Pac. Rep. 38; Hoffman-Marks Co. v. Spires, 154 Cal. 111, 116, 97 Pac. Rep. 152; Hubbard v. Lee, 6 Cal. App. 602, 606, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528; Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157; Lucas v. Rea, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537. See Merced L. Co. v. Bruschi, 152 Cal. 372, 374, 92 Pac. Rep. 844; Los Angeles P. B. Co. v. Higgins, 8 Cal.

Additional matter to foot-note 46.²⁹

§ 325. **Same. How far effective.** The invalidity of the contract does not make the owner liable for the negligence of an independent contractor to third parties where under the terms of the contract the owner has no right to exercise any control over the manner and mode of doing the work by the contractor.³⁰

Additional matter to foot-note 48.³¹

Additional matter to foot-note 50.³²

App. 514, 518, 97 Pac. Rep. 414, 420; *Burnett v. Glas*, 154 Cal. 249, 255, 97 Pac. Rep. 422.

Colorado. See *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

²⁹ **California.** *D. I. Nofsiger L. Co. v. Waters*, 10 Cal. App. 89, 92, 101 Pac. Rep. 38. See *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

³⁰ **California.** *Smith v. Dryden* (Cal. App., March 10, 1911), 115 Pac. Rep. 455.

³¹ **California.** See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 519, 97 Pac. Rep. 414, 420.

³² Compare *National S. Co. v. Wyandotte C. & L. Co.*, 76 Kan. 914, 92 Pac. Rep. 1111; s. c., sub. nom. *Atkin v. Wyandotte C. & L. Co.*, 73 Kan. 768, 84 Pac. Rep. 1040.

CHAPTER XVIII.

BUILDING CONTRACTS (CONTINUED). EXTINCTION OF
CONTRACT.

§ 326. Alteration of original contract. Statutory provisions.

Additional matter to foot-note 1.¹

§ 327. Same. To what original contracts provisions applicable.

Additional matter to foot-note 4.²

§ 328. Same. Statutory original contract. Modifications of the statutory original contract when not filed with the recorder, as required by the statute before the amendment of 1911 to the Code of Civil Procedure of California, were of no effect.³

1 Modifying contract generally:

California. See *Puritas L. Co. v. Green* (Cal. App., March 21, 1911), 115 Pac. Rep. 660; *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 42, 106 Pac. Rep. 413; *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237, 107 Pac. Rep. 150. See § 1184, Code Civ. Proc., as amended, Stats. & Amdts. 1911, pp. 1313 et seq., changing these provisions.

Kansas. See *Smith v. Chicago L. & C. Co.* (Kan., March 11, 1911), 114 Pac. Rep. 372, 374.

General rules as to modification of contracts: See *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. Rep. 154, 159.

Oregon. Modification, owing to strict performance producing unworkmanlike and defective results: See *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533, 535.

Utah. Modification, releasing liability under original contract; waiver as consideration: See *Prye v. Kalbaugh*, 34 Utah 306, 97 Pac. Rep. 331, 334.

2 California. The statutory original contract was abolished by act of May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq. See §§ 214, 258, 269, 274, 281 and 283, this Supplement, ante, notes.

3 California. *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 859; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub. nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423. See § 1183, Code Civ. Proc., as amended, Stats. & Amdts. 1911, pp. 1313 et seq., requiring modifications of the original contract to be filed in order that the liability of the owner may be limited to the contract price. See, also, note to preceding section.

§ 329. Same. Alterations, how evidenced. Effect.

Additional matter to foot-note 15.⁴

Additional matter to foot-note 16.⁵

Additional matter to foot-note 17.⁶

§ 330. Same. Extending credit.

Additional matter to foot-note 19.⁷

§ 331. Same. Payments.

Additional matter to foot-note 22.⁸

§ 332. Same. Power of architect to alter contract.

Additional matter to foot-note 26.⁹

§ 333. Novation.

Additional matter to foot-note 27.¹⁰

§ 334. Performance of contract. How considered herein.

Additional matter to foot-note 32.¹¹

⁴ **California.** See notes to §§ 327, 328, this Supplement, ante.

Utah. Release of old contract and making new contract: See *Prye v. Kalbaugh*, 34 Utah 306, 97 Pac. Rep. 331.

⁵ **Oregon.** See *Williams v. Mount Hood Ry. & P. Co. (Oreg.)*, 110 Pac. Rep. 490, 491, 111 Pac. Rep. 17. Burden of proof on contractor to show modifications: See *Adams v. MacKenzie (Oreg.)*, 114 Pac. Rep. 460.

⁶ **Oregon.** *Edmunds v. Welling (Oreg.)*, 110 Pac. Rep. 533, 535. See *McCue v. Whitwell*, 156 Mass. 205, 30 N. E. Rep. 1134.

⁷ **California.** § 1190, Code Civ. Proc., was amended by Stats. & Amdts. 1911, pp. 1313 et seq.

⁸ **California.** See §§ 327 and 328, this Supplement, ante, notes.

Washington. See *Kracht v. Empire State S. Co. (Wash.)*, 113 Pac. Rep. 773; *Keenan v. Empire State S. Co. (Wash.)*, 113 Pac. Rep. 636, 638.

⁹ See *Architect*, §§ 119 et seq., this Supplement, ante, and notes.

¹⁰ **California.** See *Russell v. Ross*, 157 Cal. 174, 181, 106 Pac. Rep. 583; *Lemon v. Hubbard*, 10 Cal. App. 471, 102 Pac. Rep. 554.

Accord and satisfaction:

California. See *Weller v. Stevens*, 12 Cal. App. 779, 108 Pac. Rep. 532; *Sirch E. & T. L. v. Garbutt*, 13 Cal. App. 435, 110 Pac. Rep. 140, 141.

Colorado. See *Harvey v. Denver & R. G. R. Co.*, 44 Colo. 253, 99 Pac. Rep. 31, 33.

Washington. See *Seattle R. & S. Ry. Co. v. Seattle-Tacoma P. Co.*, (Wash.), 116 Pac. Rep. 289.

Wyoming. See *City of Rawlins v. Jungquist*, 16 Wyo. 403, 96 Pac. Rep. 144.

¹¹ **Utah.** Place of performance of contract in another state: See generally, *Lawson v. Tripp*, 34 Utah 28, 95 Pac. Rep. 520.

§ 335. Same. Original contract valid.Additional matter to foot-note 37.¹²Additional matter to foot-note 38.¹³Additional matter to foot-note 39.¹⁴**§ 336. Same. Original contract void.**Additional matter to foot-note 41.¹⁵**§ 337. Same. Time of performance.**Additional matter to foot-note 44.¹⁶**§ 338. Same. General rule. Conditions.**Additional matter to foot-note 45.¹⁷Additional matter to foot-note 46.¹⁸Additional matter to foot-note 47.¹⁹

§ 339. Same. Excuses for non-performance. The contractor is not absolved from performance of the contract by natural obstacles intervening, unless they render perform-

¹² **California.** See *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 97 Pac. Rep. 155.

¹³ **California.** See *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 115, 97 Pac. Rep. 152.

¹⁴ **Kansas.** See *Smith v. Chicago L. & C. Co. (Kan.)*, 114 Pac. Rep. 372, 374.

¹⁵ **California.** See §§ 327 and 328, this Supplement, ante, notes.

¹⁶ **New Mexico.** But held a question of law when it depends upon the construction of a written contract or undisputed extrinsic evidence: *Cowles v. Hagerman (N. M.)*, 110 Pac. Rep. 843, 844; s. c., *Hagerman v. Cowles*, 14 N. M. 422, 94 Pac. Rep. 946; *Neher v. Viviani (N. M.)*, 110 Pac. Rep. 695, 697.

When time of performance not stated, reasonable time implied:

New Mexico. *Hagerman v. Cowles*, 14 N. M. 422, 94 Pac. Rep. 946; s. c., *Cowles v. Hagerman (N. M.)*, 110 Pac. Rep. 843.

Oregon. *Browne v. Sharkey (Oreg.)*, 115 Pac. Rep. 156.

Washington. *Berlin M. Works v. Miller*, 110 Pac. Rep. 422, 424.

See § 225, this Supplement, ante.

¹⁷ **California.** See *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616.

Colorado. See *Lombardi v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 965, 966.

¹⁸ **Utah.** *Ryan v. Curlew I. & R. Co. (Utah)*, 104 Pac. Rep. 218, 220.

¹⁹ **California.** See *Carlson v. Sheehan*, 157 Cal. 692, 698, 109 Pac. Rep. 29.

ance practically impossible; mere difficulty, or unusual or unexpected expense will not excuse him.²⁰

Additional matter to foot-note 49.²¹

Additional matter to foot-note 50.²²

Additional matter to foot-note 53.²³

Additional matter to foot-note 57.²⁴

Additional matter to foot-note 58.²⁵

Additional matter to foot-note 59.²⁶

§ 340. Same. Performance of warranty.

Additional matter to foot-note 62.²⁷

²⁰ *California*. *Carlson v. Sheehan*, 157 Cal. 682, 697, 109 Pac. Rep. 29.

But trifling imperfections do not affect the right to recover: *A. D. McAdam v. Russell*, 112 Pac. Rep. 345; but held otherwise, if the owner has not accepted the work or entered into the use and occupation of the building, where the contract provides that in case of destruction of the building, the contractor should lose the unpaid installments: *Seebach v. Kuhn*, 9 Cal. App. 485, 489, 99 Pac. Rep. 723.

²¹ Compare *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616.

²² *California*. *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 42, 106 Pac. Rep. 413.

Kansas. *Collier v. Monger (Kan.)*, 113 Pac. Rep. 385; s. c., 75 Kan. 550, 89 Pac. Rep. 1011.

²³ *Prevention of performance:*

California. *Carlson v. Sheehan*, 157 Cal. 692, 695, 109 Pac. Rep. 29 (and other matters excusing performance); *Puritas L. Co. v. Green* (Cal. App.), 115 Pac. Rep. 660; *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237, 107 Pac. Rep. 170. See *Hill v. Clark*, 7 Cal. App. 609, 610, 95 Pac. Rep. 382; *Seebach v. Kuhn*, 9 Cal. App. 485, 490, 99 Pac. Rep. 723.

Colorado. *Lombardi v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 695.

²⁴ *California*. *Beck v. Schmidt*, 13 Cal. App. 448, 110 Pac. Rep. 455, 456; *Fairchild-Gilmore-Wilton Co. v. Southern R. Co.*, 158 Cal. 264, 110 Pac. Rep. 951, 955. See *Carlson v. Sheehan*, 157 Cal. 692, 696, 109 Pac. Rep. 29.

Kansas. *Bailey v. Fredonia G. Co.*, 82 Kan. 746, 109 Pac. Rep. 411.

Missouri. See *Bean v. Miller*, 69 Mo. 384.

Rescission:

California. See *Carlson v. Sheehan*, 157 Cal. 692, 696, 109 Pac. Rep. 29.

Idaho. See *Tatum v. Coast L. Co.*, 16 Idaho 471, 101 Pac. Rep. 957.

Oregon. See *Holland v. Rhoades (Oreg.)*, 106 Pac. Rep. 779.

Washington. See *Evans v. Oregon & W. R. Co.*, 58 Wash. 429, 108 Pac. Rep. 1095; *Young Men's Christian Assoc. v. Gibson*, 58 Wash. 307, 108 Pac. Rep. 766, 769.

²⁵ *California*. Compare *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616.

²⁶ *California*. See *Fairchild-Gilmore-Wilton Co. v. Southern R. Co.*, 158 Cal. 264, 110 Pac. Rep. 951, 955.

²⁷ *Kansas*. See *International F. Co. v. Caney I. & C. Co. (Kan.)*, 115 Pac. Rep. 635.

§ 341. Same. "Trifling imperfection."Additional matter to foot-note 63.²⁸Additional matter to foot-note 69.²⁹**§ 342. Same. Substantial performance generally required.**Additional matter to foot-note 71.³⁰

Washington. See *Yundt v. Schultz-Degginger Co.* (Wash.), 113 Pac. Rep. 760.

28 Trifling imperfection:

Oregon. Not to extend time for filing claim of lien: *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079, 52 Oreg. 545, 97 Pac. Rep. 108, 52 Oreg. 546, 97 Pac. Rep. 1082; *Crane Co. v. Ellis* (Oreg.), 114 Pac. Rep. 475.

Washington. See *A. D. McAdam, Inc. v. Russell* (Wash.), 112 Pac. Rep. 345.

29 Oregon. *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533.

30 California. *Hill v. Clark*, 7 Cal. App. 609, 611, 95 Pac. Rep. 382. See *Seebach v. Kuhn*, 9 Cal. App. 485, 488, 97 Pac. Rep. 723.

Colorado. *Lombardi v. Overland D. & R. Co., v. Colorado I. W. Co.* (Colo.), 111 Pac. Rep. 553, 555.

Montana. See *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 672.

Oregon. Where there is a substantial performance of a building contract, although not an exact performance, the rules by which proper deductions are to be ascertained are stated as follows:

"In case of entire neglect to furnish an item of labor or material, or in case of a defect which may be easily remedied without taking down and reconstructing a substantial portion of the building, this allowance should equal the reasonable expense of supplying or correcting the defect.

"In case of a defect which could only be remedied by taking down and reconstructing some substantial portion of the building, the allowance should be the amount which the building is worth less by reason of the defect than the contract price": *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533, 535, citing and quoting from *Manitowoc S. B. Works v. Manitowoc G. Co.*, 120 Wis. 1, 97 N. W. 515.

In the case of *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. Rep. 515, "the court makes three exceptions from the rule that strict compliance with the contract is essential to recovery:

"First, in favor of laborers who contract to perform personal services, and without fault of either party fail to complete performance; * * *

"Secondly, in building contracts, where the contractor constructs something on the land of another which by oversight, but in good faith effort to perform, fails to entirely satisfy the contract, but is so substantially in compliance therewith that the structure fully accomplishes the purpose of that contracted for, and the other party voluntarily accepts the benefit thereof, or where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment; * * *

"Thirdly, where the contractor supplies an article different from or inferior to that promised, which with knowledge thereof is accepted.

"The court concludes from these exceptions that the question is not what will reasonably compensate the contractor, but what can the purchaser pay without being put in worse position than if the contract had been performed. The same principle is recognized in *Gove & Co. v. I. C. M. & M. Co.*, 16 Oreg. 96, 17 Pac. Rep. 740, where it is held that, if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it, the defendant being entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract": *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533, 535.

Utah. A party entering into a building contract may not abandon the contract and recover more than the contract price upon a quantum meruit; "but there may be cases where the stipulations of the contract have been departed from either by the express consent of the parties or by implication through their conduct in making changes in materials, workmanship, or structure by reason of which it may become a matter of doubt whether the contract as a whole has been abandoned or not.

In such cases the contractor may, in the first instance, sue as upon a quantum meruit, and leave it to the defendant to set up and insist upon the contract for the purpose of limiting the recovery to the price stipulated therein.

The defendant may in such a case likewise insist that the stipulations of the contract remain in full force and have not been performed, and may demand damages for a non-compliance with the terms of the express contract.

The contractor may, however, in such cases, also base his action upon both the contract and upon a quantum meruit by setting up the former in one count and the latter in another in his complaint.

In all such cases a recovery by either party will be allowed in accordance with the facts developed at the trial and the law applicable thereto.

Again, a contractor, in case the contract is fully performed, and nothing remains except to obtain payment, may sue to recover the amount unpaid without specially declaring upon the express contract.

These propositions have been discussed and passed upon many times by the courts, and are illustrated and applied in the following cases:

Todd v. Huntington, 13 Oreg. 9, 4 Pac. Rep. 295; *Schwartzel v. Karnes*, 2 Kan. App. 782, 44 Pac. Rep. 41; *Board of Commissioners v. Gibson*, 158 Ind. 471, 63 N. E. Rep. 982; *Moore v. Gaus Sons' Mfg. Co.*, 113 Mo. 98, 20 S. W. Rep. 975; *Burgess v. Helm*, 24 Nev. 242, 51 Pac. Rep. 1025; *Wilson v. Smith*, 61 Cal. 209.

Undoubtedly, one may not depart from the stipulations of his contract and then sue and recover as upon a quantum meruit. Neither is the contractor prevented from recovery upon a contract in case he has not literally complied with all the terms and conditions therein imposed.

A substantial compliance, if made in good faith, and so as to make the thing contracted for useful and beneficial to the owner for the purposes for which it was intended and in compliance with the true intent and spirit of the contract, in most instances, is a sufficient compliance to permit a recovery upon the contract, with the right of the owner to recoup any damages he may have sustained by reason of the contractor's failure to literally comply with the terms of the contract.

While the cases can not all be reconciled, and the courts of some states adhere to one rule, while those of other states follow another,

Additional matter to foot-note 72.³¹

Additional matter to foot-note 74.³²

§ 343. Same. General principles.

Additional matter to foot-note 75.³³

Additional matter to foot-note 76.³⁴

§ 344. Same. Slight difference in value.

Additional matter to foot-note 77.³⁵

§ 345. Same. Conveniences.

Additional matter to foot-note 79.³⁶

we think the trend of modern decision is to the effect as outlined above": *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004, 1006, 1007; *Ryan v. Curlew I. & R. Co. (Utah)*, 104 Pac. Rep. 218, 221.

Washington. See *A. D. McAdam, Inc., v. Russell (Wash.)*, 112 Pac. Rep. 345; *Sweatt v. Bonne*, 110 Pac. Rep. 617; *Lazella v. Empire State S. Co.*, 58 Wash. 589, 109 Pac. Rep. 195, 196.

Wisconsin. See *Sherry v. Madler*, 123 Wis. 621, 101 N. W. Rep. 1095; *Manitowoc S. B. Works v. Manitowoc G. Co.*, 120 Wis. 1, 97 N. W. Rep. 515; *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. Rep. 543, 24 L. R. A. (N. S.), 327.

³¹ **Kansas.** *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 888, 889.

Oregon. *Edmunds v. Welling (Oreg.)*, 110 Pac. Rep. 533.

Utah. See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004.

Washington. *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. Rep. 184.

³² **California.** *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 233, 101 Pac. Rep. 691.

Colorado. *Ross M. & M. Co. v. Sethman (Colo.)*, 114 Pac. Rep. 287.

Oregon. *Adams v. MacKenzie (Oreg.)*, 114 Pac. Rep. 460.

Acceptance of work is waiver of strict performance:

California. *Sirch E. & T. L. v. Garbutt*, 13 Cal. App. 435, 110 Pac. Rep. 140, 141.

Oregon. *Williams v. Mount Hood Ry. & P. Co. (Oreg.)*, 111 Pac. Rep. 17; s. c., 110 Pac. Rep. 490.

³³ **Washington.** *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. Rep. 184.

³⁴ **California.** Compare *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616.

Illinois. See *Keeler v. Herr*, 157 Ill. 57, 41 N. E. Rep. 750.

Iowa. See *Smith v. Bristol*, 33 Ia. 24.

Kansas. See *McCullough v. S. J. Hayde C. Co.*, 82 Kan. 734, 109 Pac. Rep. 176.

Missouri. See *Hayster v. Owen*, 61 Mo. 270.

³⁵ **California.** See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

³⁶ **California.** See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

§ 346. **Same. Erection of structure in part only.**
Additional matter to foot-note 80.³⁷

§ 347. **Same. "Completion" of mining claim.**
Additional matter to foot-note 82.³⁸

§ 348. **Statutory equivalents of completion for the purpose of filing claims of lien.**
Additional matter to foot-note 83.³⁹

§ 349. **Same. Statutory provisions.**
Additional matter to foot-note 85.⁴⁰

§ 350. **Same. Occupation and use. Scope and object of statutory provisions.** Occupation and use of the structure, or acceptance of the same, must be coupled with cessation from labor for thirty days to constitute constructive or statutory completion for the purpose of filing claims of lien.⁴¹
Additional matter to foot-note 86.⁴²

§ 351. **Same. Character of occupation or use.** Occupation of a structure is not notice of completion, when the original contract expressly provides that the completion payment shall not be made until acceptance, and such accept-

³⁷ *California*. But see *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 268, 269, 96 Pac. Rep. 728.

See § 351, this Supplement, post, and notes.

³⁸ See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. and Amdts. 1911, pp. 1313 et seq.).

³⁹ *California*. See *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 486, 94 Pac. Rep. 773.

See amendment to § 1187, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq.

The statutory equivalents of completion for the purpose of filing claims of lien have been termed by the court "constructive completion": *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984, 987.

⁴⁰ *California*. See amendment to § 1187, Code Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq.

⁴¹ *California*. *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 94 Pac. Rep. 773; *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984, 988.

See §§ 354-357, 432-433, this Supplement, post, and notes.

⁴² *California*. Now held: Such occupation and cessation must have concurred: *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 94 Pac. Rep. 773. See note to § 349, this Supplement, ante.

ance is expressly refused during such occupation until a later date, when such occupation is by express consent of the claimant subject to the right of the claimant to proceed with the completion.⁴³

Additional matter to foot-note 89.⁴⁴

Additional matter to foot-note 90.⁴⁵

§ 352. Same. Void contract.

Additional matter to foot-note 91.⁴⁶

§ 353. Same. Acceptance. Waiver. If the owner by his own declaration intentionally misleads the claimant to believe that the building is not completed, and the claimant acts upon such declaration by reason thereof, the owner will not be permitted to falsify such declaration, and he will be estopped from claiming that the claimant's claim of lien was not filed in time.⁴⁷ It is not necessary that the entire work shall be completed before there can be an acceptance of any of the work.⁴⁸

Additional matter to foot-note 97.⁴⁹

⁴³ *California*. *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 232.

⁴⁴ *Idaho*. *Latent and patent defects*: See *Steltz v. Armory Co.*, 15 Idaho 551, 99 Pac. Rep. 98, 100.

⁴⁵ *California*. See *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 269, 96 Pac. Rep. 728.

⁴⁶ *California*. § 1187, Code Civ. Proc., was amended by Stats. & Amdts. 1911, pp. 1313 et seq., and the statutory original contract was abolished by said act.

⁴⁷ *California*. *Hubbard v. Lee*, 6 Cal. App. 602, 608, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

See *Minneapolis Trust Co. v. Maxfield*, 81 Minn. 28, 83 N. W. Rep. 463.

⁴⁸ *California*. *Sirch E. & T. L. v. Garbutt*, 13 Cal. App. 435, 110 Pac. Rep. 140, 141.

⁴⁹ *California*. *Sirch E. & T. L. v. Garbutt*, 13 Cal. App. 435, 110 Pac. Rep. 140, 141; *Lacy M. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 40, 106 Pac. Rep. 413.

Colorado. *Ross M. & M. Co. v. Sithman* (Colo.), 114 Pac. Rep. 287. Compare *Town of Sterling v. Hurd*, 44 Colo. 436, 98 Pac. Rep. 174 (acceptance by engineer).

New Mexico. *Cowles v. Hagerman* (N. M.), 110 Pac. Rep. 843, 845; s. c., sub. nom. *Hagerman v. Cowles*, 14 N. M. 422, 94 Pac. Rep. 946.

Oklahoma. See *Minnetonka O. Co. v. Cleveland V. B. Co.* (Okl.), 111 Pac. Rep. 326.

Oregon. *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533, 535; *Williams v. Mount Hood Ry. & P. Co.* (Oreg.), 111 Pac. Rep. 17, 110 Pac. Rep. 490.

Additional matter to foot-note 99.⁵⁰

Additional matter to foot-note 100.⁵¹

Additional matter to foot-note 101.⁵²

§ 354. Same. Cessation from labor for thirty days. Statutory provision. Under the statute, as it existed prior to the amendments of 1911,⁵³ the original contract was not deemed completed until there had been a cessation from labor for thirty days in addition to the occupation of the structure by the owner, or his agent; that is, the occupation and use, or acceptance, had to be coupled with such cessation to constitute a constructive or statutory completion for the purpose of filing claims of lien.⁵⁴

Additional matter to foot-note 102.⁵⁵

§ 355. Same. Scope of provision.

Additional matter to foot-notes 103 and 104.⁵⁶

§ 356. Same. Character of cessation.

Additional matter to foot-note 106.⁵⁷

Utah. Ryan v. Curlew I. & R. Co. (Utah), 104 Pac. Rep. 218, 220.

Washington. Acceptance of severable part, under severable contract: Compare Berlin M. Works v. Miller (Wash.), 110 Pac. Rep. 422, 424.

⁵⁰ **California.** Compare Dahlberg v. Girsch, 157 Cal. 324, 330, 107 Pac. Rep. 616.

Idaho. Owner taking possession of building; latent and patent defects: See Steltz v. Armory Co., 15 Idaho 551, 99 Pac. Rep. 98, 100.

⁵¹ **California.** See § 350, ante, and §§ 354, 357, 432 and 433, this Supplement, post, and notes.

⁵² **Washington.** See Cascade L. Co. v. Aetna I. Co., 56 Wash. 503, 106 Pac. Rep. 158; Minneapolis S. & M. Co. v. Aetna I. Co., 56 Wash. 699, 106 Pac. Rep. 160.

⁵³ **California.** § 1187, Code Civ. Proc.

⁵⁴ **California.** Baker v. Lake L. & I. Co., 7 Cal. App. 482, 484, 94 Pac. Rep. 773 (distinguishing a number of cases); Robison v. Mitchell (Cal. Sup.), 114 Pac. Rep. 984, 988. See, also, §§ 350 and 357, this Supplement, ante, and notes; and §§ 422, 433, this Supplement, post, and notes.

⁵⁵ **California.** This provision survives in the amendment to § 1187, Code of Civ. Proc., Stats. & Amdts. 1911, pp. 1313 et seq. See § 350, this Supplement, ante, note.

⁵⁶ **California.** See note to § 354, this Supplement, ante.

⁵⁷ **California.** See note to § 354, this Supplement, ante.

Idaho. Compare Valley L. Co. v. Driessel, 18 Idaho 662, 93 Pac. Rep. 765.

§ 357. Same. As affected by validity or invalidity of original contract.⁵⁸

Additional matter to foot-note 108.⁵⁹

§ 358. Abandonment of original contract.

Additional matter to foot-note 114.⁶⁰

§ 359. Same. Owner's liability.

Additional matter to foot-note 115.⁶¹

Additional matter to foot-note 117.⁶²

Missouri. Compare *Darling L. Co. v. Harris*, 107 Mo. App. 148, 80 S. W. Rep. 688.

Nevada. See *Tonopah L. Co. v. Nevada A. Co.*, 30 Nev. 445, 97 Pac. Rep. 636, 639.

Wisconsin. See *Fitzgerald v. Walsh*, 107 Wis. 92, 82 N. W. Rep. 717, 81 Am. St. Rep. 824.

⁵⁸ **California.** But see § 350, this Supplement, ante, note; and see *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 94 Pac. Rep. 773.

Statutory original contract abolished by Stats. & Amdts. 1911, pp. 1813 et seq.

⁵⁹ **California.** *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. Rep. 651, and *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 94 Pac. Rep. 773 (requiring occupation and use, or acceptance, to be coupled with cessation of labor for thirty days to constitute constructive or statutory completion for the purpose of filing claims of lien) supported as to point just stated, but both overruled, so far as repugnant, by *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984, 988.

See § 433, this Supplement, post, note.

⁶⁰ **California.** See *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 144, 97 Pac. Rep. 153; *Vulcan I. Works v. Cook* (Cal. App.), 114 Pac. Rep. 995; *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616; *O'Brien v. Garibaldi* (Cal. App.), 115 Pac. Rep. 249, 252.

Rights of assignee of contractor who abandons work: *O'Brien v. Garibaldi* (Cal. App.), 115 Pac. Rep. 249.

Oregon. See *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533, 534; *Laughlin v. Connors*, 54 Oreg. 184, 102 Pac. Rep. 783.

Utah. See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004.

⁶¹ **Abandonment, act and intent:**

California. *Turner v. Markham*, 155 Cal. 562.

Oregon. *Watts v. Spencer* (Oreg.), 94 Pac. Rep. 39 (water rights).

Wyoming. *Jones v. Kepford*, 17 Wyo. 468, 100 Pac. Rep. 923 (abandonment of homestead); *Phillips v. Hamilton*, 17 Wyo. 41, 95 Pac. Rep. 846 (abandonment of lease).

⁶² **California.** *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 115, 97 Pac. Rep. 152; *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 144, 97 Pac. Rep. 155; *McCue v. Jackman*, 7 Cal. App. 703, 704, 95 Pac. Rep. 673; *Steiger T. C. & P. Co. v. City of Sonoma*, 9 Cal. App. 698, 100 Pac. Rep. 714; *Duffy L. Co. v. Stanton*, 9 Cal. App. 38, 98 Pac. Rep. 38.

Colorado. Under § 4025, Rev. St. 1908, rule in case of abandonment: *Rice v. Rhone* (Colo.), 111 Pac. Rep. 585, 587; *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 921.

Additional matter to foot-note 118.⁶³

Additional matter to foot-note 119.⁶⁴

§ 360. Same. Justification for abandonment.

Additional matter to foot-note 122.⁶⁵

Additional matter to foot-note 123.⁶⁶

Washington. See *Gordon v. Gillespie*, 58 Wash. 62, 109 Pac. Rep. 109, 110; *Young Men's Christian Assoc.*, 58 Wash. 307, 108 Pac. Rep. 766, 769.

⁶³ **California.** When under the rule declared by § 1200, as it stood before the amendment of May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.) there was no part of the contract price applicable to the payment of liens, no recovery against the property of the owner could be had; if after making the computation required by that section, no balance remains, there is nothing for the lien claimants: *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 115, 97 Pac. Rep. 152, distinguishing *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. Rep. 200, as not a case of abandonment.

The construction given in the case of *Hoffman-Marks Co. v. Spires*, supra, to § 1200, Code Civ. Proc., as it stood before the amendment of 1911, supra, is not unconstitutional: *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 97 Pac. Rep. 155.

⁶⁴ **California.** *Duffy L. Co. v. Stanton*, 9 Cal. App. 38, 98 Pac. Rep. 38.

⁶⁵ **California.** *Carlson v. Sheehan*, 157 Cal. 692, 697, 109 Pac. Rep. 29.

⁶⁶ **California.** See *Carlson v. Sheehan*, 157 Cal. 692, 698, 109 Pac. Rep. 29.

CHAPTER XIX.

CLAIM OF LIEN. NATURE, NECESSITY, AND PURPOSE.

§ 361. Resemblance between statutory provisions as to claim of lien.

Additional matter to foot-note 1.¹

Additional matter to foot-note 4.²

Additional matter to foot-note 5.³

§ 362. Nature of claim of lien.

Additional matter to foot-note 7.⁴

Additional matter to foot-note 8.⁵

Additional matter to foot-note 9.⁶

§ 363. Statutory provision. California.

Additional matter to foot-note 10.⁷

§ 364. When claim of lien is necessary.

Additional matter to foot-note 24.⁸

¹ *Kansas*. See *Fossett v. Rock Island L. & Mfg. Co.* 76 Kan. 428, 92 Pac. Rep. 833, 835.

² *California*. See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

³ *Oklahoma*. See *Jones v. Balsley (Okl.)*, 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

⁴ *California*. *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

Oklahoma. See *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547.

⁵ *Alaska*. Claim merely evidences: *Pioneer M. Co. v. Delamotte (C. C. A.)*, 185 Fed. Rep. 752, 755.

Idaho. See *Rathbun v. State*, 15 Idaho 273, 97 Pac. Rep. 335, 337.

Kansas. See *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 835.

Nevada. *Porteous D. Co. v. Fee*, 29 Nev. 375, 91 Pac. Rep. 135, 136.

Oklahoma. *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547.

⁶ *California*. *Hogan v. Bigler*, 8 Cal. App. 71, 73, 96 Pac. Rep. 97; *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. Rep. 78.

⁷ *California*. § 1187, Code Civ. Proc., was amended by act of May 1, 1911, Stats. & Amdts. 1911. pp. 1813 et seq. Among other things, the amendment changes the time of filing claim of lien and also the provisions relative to the contents of the claim of lien. See subsequent sections for details of changes.

⁸ *California*. *D. I. Nofziger L. Co. v. Waters*, 10 Cal. App. 89, 92, 101 Pac. Rep. 38.

§ 365. Purpose of claim of lien.

Additional matter to foot-note 31.⁹

Additional matter to foot-note 35.¹⁰

§ 366. The necessity of one or more claims of lien.

Additional matter to foot-note 36.¹¹

§ 367. Same. Persons joining in same claim of lien.

Additional matter to foot-note 37.¹²

§ 368. Same. Several objects and pieces of property.

Additional matter to foot-note 42.¹³

Additional matter to foot-note 43.¹⁴

⁹ **Nevada.** Porteous D. Co. v. Fee, 29 Nev. 375, 91 Pac. Rep. 135.

Oklahoma. Vanderberg v. P. T. Walton L. Co., 19 Okl. 169, 92 Pac. Rep. 149, 150. See Peaceable Creek C. Co. v. Jackson, 26 Okl. 1, 108 Pac. Rep. 409, 411. But see Murray v. Ripley, 30 Ark. 568.

Oregon. See Coffey v. Smith, 52 Oreg., 538, 97 Pac. Rep. 1079.

¹⁰ **Oklahoma.** Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 547.

¹¹ **California.** Claim under several original contracts: See Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 517, 97 Pac. Rep. 414, 420.

Oregon. See Grants Pass B. & T. Co. v. Enterprise M. Co. (Oreg.), 113 Pac. Rep. 859.

Washington. Statute to be liberally construed with regard to the number of claims that may be filed: Lindley v. McGlaulin, 58 Wash. 636, 109 Pac. Rep. 118; s. c., 57 Wash. 581, 107 Pac. Rep. 355.

¹² See notes to preceding section.

¹³ **Kansas.** Smith v. Chicago L. & C. Co. (Kan.), 114 Pac. Rep. 372.

¹⁴ **Washington.** Gilbert-Hunt Co. v. Parry (Wash.), 110 Pac. Rep. 541, 543.

CHAPTER XX.

CLAIM OF LIEN (CONTINUED). CONTENTS OF CLAIM.

§ 370. General statement as to contents of claim of lien.

Additional matter to foot-note 1.¹Additional matter to foot-note 2.²Additional matter to foot-note 4.³Additional matter to foot-note 8.⁴

§ 371. Construction of claims. General principles.

Additional matter to foot-note 13.⁵Additional matter to foot-note 14.⁶Additional matter to foot-note 21.⁷§ 372. Same. General rule for determination of sufficiency of claim.⁸

¹ *Montana*. See, generally, *Mills v. Olsen* (Mont.), 115 Pac. Rep. 33, 34.

² *California*. *Hogan v. Bigler*, 8 Cal. App. 71, 73, 96 Pac. Rep. 97.

Kansas. Omitted matters of substance can not be imported into the lien statement upon mere weighing of probabilities: *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 82.

³ *California*. § 1187, Code Civ. Proc., was amended in 1911, Stats. & Amdts. 1911, pp. 1313 et seq., and the provision as to the "terms, times given and conditions" of the contract was omitted, and another provision inserted in lieu thereof.

Oregon. See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202.

⁴ *Oregon*. *Litherland v. S. Morton Cohn R. E. & I. Co.*, 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

⁵ *California*. *Hogan v. Bigler*, 8 Cal. App. 71, 73.

But no strained construction on behalf of subclaimants: *Hogan v. Bigler*, *supra*.

Kansas. *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 82.

Montana. *Neuman v. Grant*, 36 Mont. 77, 92 Pac. Rep. 43.

Nevada. *Porteous D. Co. v. Fee*, 29 Nev. 375, 91 Pac. Rep. 135.

⁶ *Kansas*. *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 82.

Oklahoma. *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 546.

⁷ *Kansas*. See *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 81.

Oklahoma. But see *contra* as to subclaimants, not in privity with owner: *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 108 Pac. Rep. 411.

⁸ *California*. See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

§ 373. Same. What generally required.

Additional matter to foot-note 25.⁹

§ 374. Same. Unnecessary statements.

Additional matter to foot-note 29.¹⁰

Additional matter to foot-note 30.¹¹

Additional matter to foot-note 32.¹²

Additional matter to foot-note 33.¹³

Additional matter to foot-note 34.¹⁴

Additional matter to foot-note 37.¹⁵

Additional matter to foot-note 42.¹⁶

§ 375. Statement of demand, after deducting credits and offsets. There is no material difference between a statement of the amount due, without setting out the credits, and a statement of the whole amount of the debit side of the account and also of the credits.¹⁷

Additional matter to foot-note 49.¹⁸

⁹ **Montana.** McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 356.

¹⁰ **Kansas.** See Chicago L. & C. Co. v. Washington, 80 Kan. 613, 103 Pac. Rep. 80, 81.

¹¹ **Oregon.** Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

¹² **Oregon.** Claim need not show that work was done on fixture to mine: Washburn v. Intermountain M. Co. (Oreg.), 109 Pac. Rep. 382, 385.

See Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg., 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

¹³ **Oregon.** Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

¹⁴ **Oregon.** Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

¹⁵ **Oregon.** But see Equitable S. & L. Assoc. v. Hewitt (Oreg.), 106 Pac. Rep. 447, 451.

¹⁶ **Montana.** McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 356.

Oregon. See Durkheimer v. Copperopolis C. Co. (Oreg.), 104 Pac. Rep. 895, 897.

¹⁷ **California.** Lucas v. Rea, 10 Cal. App. 641, 646, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

¹⁸ **New Mexico.** "In some jurisdictions, as for instance, Washington, this provision ('Statement of his demands,' § 2221, Comp. Laws N. M.) has been quite strictly construed, and it is there held that it must appear what the labor or materials were for which the claim is asserted (See Warren v. Quade, 3 Wash. St. 750, 29 Pac. Rep. 827). In other jurisdictions it is held, more properly, as we believe, that a statement

Additional matter to foot-note 55.¹⁹

§ 376. Same. Object of provision as to demand.

§ 377. Same. Commingling lienable and non-lienable items.

Additional matter to foot-note 60.²⁰

Additional matter to foot-note 61.²¹

§ 378. Same. Demands against two or more buildings.

Additional matter to foot-note 63.²²

§ 379. Names required to be stated in claim. In general.

Additional matter to foot-note 66.²³

of the general nature of the materials furnished, or labor performed, together with the amount claimed to be due therefor, after deducting all just credits and offsets, is all that is required": *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 604.

¹⁹ *California. Mistake in demand: Stockton L. Co. v. Schuler*, 155 Cal. 411, 414, 101 Pac. Rep. 307.

Montana. Neuman v. Grant (Mont.), 36 Mont. 77, 92 Pac. Rep. 48.

Oregon. Eugene P. M. Co. v. Snell (Oreg.), 106 Pac. Rep. 21.

Claim statement, known to be untrue, or by the exercise of reasonable diligence could have been found to be false, invalid: *Equitable S. & L. Assoc. v. Hewitt (Oreg.)*, 106 Pac. Rep. 447, 451 (under B. & C. Comp., § 5683).

The receipt of payment is a fact particularly within the knowledge of the claimant, and he is bound to state it truly in his claim of lien: *Equitable S. & L. Assoc. v. Hewitt (Oreg.)*, 106 Pac. Rep. 447, 451.

²⁰ *Alaska. Pioneer M. Co. v. Delamotte (C. C. A.)*, 185 Fed. Rep. 752, 755.

Washington. Little Bros. Mill Co. v. Baker, 57 Wash. 311, 106 Pac. Rep. 910; *Gilbert-Hunt Co. v. Parry (Wash.)*, 110 Pac. Rep. 541, 543 (quoting text of Treatise).

²¹ *Colorado. Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573; *Rice v. Rhone (Colo.)*, 111 Pac. Rep. 585.

Kansas. Home L. & S. Co. v. School Dist. (Kan.), 115 Pac. Rep. 590.

New Mexico. See Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co., 14 N. M. 300, 93 Pac. Rep. 706, 710; *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 604.

Oregon. See Rowen v. Alladio, 51 Oreg. 121, 93 Pac. Rep. 929; *Alderson v. Lee*, 52 Oreg. 92, 96 Pac. Rep. 234, 236.

Washington. Strandell v. Moran, 49 Wash. 533, 95 Pac. Rep. 1106. *See Bellingham v. Linck*, 53 Wash. 208, 101 Pac. Rep. 843; *Gilbert-Hunt Co. v. Parry (Wash.)*, 110 Pac. Rep. 541, 543.

²² *Oregon. See contra: Crane Co. v. Erie H. Co. (Oreg.)*, 112 Pac. Rep. 430.

²³ *Washington. Compare Carney v. Bigham*, 51 Wash. 452, 99 Pac. Rep. 21, 22.

Additional matter to foot-note 69.²⁴

§ 380. Same. Name of owner or reputed owner.

Additional matter to foot-note 71.²⁵

Additional matter to foot-note 72.²⁶

Additional matter to foot-note 73.²⁷

Additional matter to foot-note 74.²⁸

Additional matter to foot-note 75.²⁹

Additional matter to foot-note 79.³⁰

§ 381. Same. Employer. Purchaser.

Additional matter to foot-note 92.³¹

Additional matter to foot-note 93.³²

§ 382. Same. Under void statutory original contract.³³

Additional matter to foot-note 97.³⁴

²⁴ California. Hogan v. Bigler, 8 Cal. App. 71, 96 Pac. Rep. 97.

California. Common law right to change name: See Emery v. Kipp, 154 Cal. 83, 97 Pac. Rep. 17, 19.

Idem sonans: "Tasso" and "Dasso," see Napa State Hospital v. Dasso, 153 Cal. 98, 96 Pac. Rep. 355.

Washington. Doctrine of idem sonans as to names: Kelly v. Kuhnhausen, 51 Wash. 193, 98 Pac. Rep. 603.

²⁵ California. Hogan v. Bigler, 8 Cal. App. 71, 73, 96 Pac. Rep. 97.

²⁶ California. Hogan v. Bigler, 8 Cal. App. 71, 96 Pac. Rep. 97.

²⁷ California. Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

²⁸ California. See Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

²⁹ California. Lucas v. Gobbi, 10 Cal. App. 648, 651, 103 Pac. Rep. 157.

³⁰ California. Lucas v. Gobbi, 10 Cal. App. 648, 651, 103 Pac. Rep. 157.

³¹ California. Hogan v. Bigler, 8 Cal. App. 71, 96 Pac. Rep. 97.

"Party to be charged": Compare Harper v. Goldschmidt, 156 Cal. 245, 104 Pac. Rep. 451.

Kansas. Chicago L. & C. Co. v. Washington, 80 Kan. 613, 103 Pac. Rep. 80, 81.

³² Kansas. See Chicago L. & C. Co. v. Washington, 80 Kan. 613, 103 Pac. Rep. 80, 81.

Oregon. See Bohn v. Wilson, 53 Oreg. 490, 101 Pac. Rep. 202, 204.

³³ California. The statutory original contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 268, 274, 281, 288 and 328, this Supplement, ante.

³⁴ California. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 495, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423; Lucas v. Rea, 10 Cal. App. 641, 102 Pac. Rep. 322, 101 Pac. Rep. 537.

Additional matter to foot-note 98.³⁵

§ 383. Same. Inferential statements.

Additional matter to foot-note 99.³⁶

§ 384. Same. "Causing" improvement.

§ 385. Same. Name of agent.

Additional matter to foot-note 104.³⁷

§ 386. Same. Two or more employers or purchasers.

§ 387. Terms, time given, and conditions of contract. In general.

Additional matter to foot-note 109.³⁸

§ 388. Same. Object and construction of provision.

Another object of the provision is to inform the owner as to the extent and nature of the lienor's claim, to facilitate an investigation as to its merits.³⁹

The test of the sufficiency of the claim of lien with respect to this provision is whether it departs so far from the terms and conditions of the contract as to mislead, to the injury of the owner; if there is a substantial agreement between the contract and the claim of lien, so that there could not arise in the mind of the owner any misapprehension as to

³⁵ *California*. *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 322, 101 Pac. Rep. 537.

³⁶ *Kansas*. See *Chicago L. & C. Co. v. Washington*, 80 Kan., 613, 103 Pac. Rep. 80, 81.

³⁷ *Oregon*. *Litherland v. S. Morton Cohn R. E. & I. Co.*, 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303. See *Equitable S. & L. Assoc. v. Hewitt (Oreg.)*, 106 Pac. Rep. 447, 451.

³⁸ *California*. See *Barrett-Hicks Co. v. Glas (Cal. App.)*, 111 Pac. Rep. 760, 764, 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423. See *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 232, 101 Pac. Rep. 691.

See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

³⁹ *California*. *Barrett-Hicks Co. v. Glas (Cal. App.)*, 111 Pac. Rep. 760, 764; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c. sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

the extent and nature of the lienor's claim, it is sufficient; otherwise, not.⁴⁰

Additional matter to foot-note 111.⁴¹

Additional matter to foot-note 112.⁴²

Additional matter to foot-note 114.⁴³

§ 389. Same. General rules.

Additional matter to foot-note 116.⁴⁴

Additional matter to foot-note 118.⁴⁵

Additional matter to foot-note 119.⁴⁶

§ 390. Same. Showing contractual indebtedness.

Additional matter to foot-note 122.⁴⁷

Additional matter to foot-note 123.⁴⁸

§ 391. Same. Setting out terms of original contract.

Additional matter to foot-note 125.⁴⁹

§ 392. Same. Reference to other papers.

⁴⁰ *California*. *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 764, s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c. sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

⁴¹ *California*. *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 764; 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

⁴² *Nevada*. *Porteous D. Co. v. Fee*, 29 Nev. 375, 91 Pac. Rep. 135.

⁴³ *California*. *Lucas v. Rea*, 10 Cal. App. 641, 645, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

Nevada. *Porteous D. Co. v. Fee*, 29 Nev. 375, 91 Pac. Rep. 135.

⁴⁴ *California*. *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 764; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c. sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

⁴⁵ *New Mexico*. *Gray v. New Mexico P. S. Co.* (N. M.), 110 Pac. Rep. 603, 604.

⁴⁶ *New Mexico*. *Gray v. New Mexico P. S. Co.* (N. M.), 110 Pac. Rep. 603, 604.

⁴⁷ *Nevada*. But see *Porteous D. Co. v. Fee*, 29 Nev. 375, 91 Pac. Rep. 135.

⁴⁸ *Oregon*. *Litherland v. S. Morton Cohn R. E. & I. Co.*, 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

⁴⁹ *California*. See *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 232, 101 Pac. Rep. 691.

§ 393. Same. Express and implied agreement as to price.Additional matter to foot-note 128.⁵⁰Additional matter to foot-note 129.⁵¹Additional matter to foot-note 130.⁵²

⁵⁰ **California.** See *Coghlan v. Quartararo* (Cal. App.), 115 Pac. Rep. 664, 666.

⁵¹ **California.** But the rule of the text seems to have been changed in the later cases: *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157 (hearing in Supreme Court denied); *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822. See, also, *Star M. & L. Co. v. Porter*, 4 Cal. App. 470, 88 Pac. Rep. 497.

⁵² **California.** "In *Star M. & L. Co. v. Porter*, 4 Cal. App. 470, 88 Pac. Rep. 497, it was said: 'The notice is, indeed, incorrect in stating as one of the terms of the contract that the claim was based on a quantum meruit, instead of upon a special promise to pay a fixed amount; and this doubtless as a matter of pleading would constitute at common law a material variance, though hardly under existing practice. (Code of Civ. Proc., § 469.) But, as we have already said, the technical doctrine of variance has no application to a notice of lien, when all that is required is that the statement of the terms of the contract shall be substantially true. There are, indeed, many cases cited by the appellant, and other cases, which might be conceived to hold the contrary doctrine. (*Reed v. Norton*, 99 Cal. 619, 34 Pac. Rep. 333; *Palmer v. Lavigne*, 104 Cal. 34, 37 Pac. Rep. 775; *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 380, 10 Cal. App. 640, 646, 51 Pac. Rep. 555; *Wilson v. Nugent*, 125 Cal. 283, 57 Pac. Rep. 1008). But these, or most of them, are distinguished from the present case in that it did not appear that the fixed price stated was the market price. In the absence of this fact, the statement would be substantially false and might mislead the owner to his prejudice. But where the fact appears, no injury can result to the owner; nor can the misstatement be regarded as material.'"

And it was held that, conceding that the statement in the claim "and the said A. S. Howell agreed to pay said sum of \$799.99 so due upon the completion of the work" sets forth an express agreement at the time the material was ordered, it is difficult to see how the appellants (owners) were injured, where the evidence showed that this was actually the market value, barring a slight variance on account of an error committed in the account by Mr. Lucas (the claimant); the court saying: "But, again, the said notice is at most uncertain as to whether claimants relied upon an express or an implied contract. In the endeavor to comply with the requirement of the statute to set out the 'terms, time given, and conditions of his contract,' this statement was made in said notice: 'That the terms, time given and condition of the contract between claimants and said A. S. Howell are as follows: The claimants were employed on or about the 6th day of July, 1906, by said A. S. Howell, the original contractor for said building, to furnish lumber and building material to be used in the construction and erection of said building and its additions. That there was no condition attached to said contract, between these claimants and said A. S. Howell and no time was set for the payment thereof except that the amount due claimants was to be paid as soon as the work was completed and finished by them.' The foregoing purports to contain all the terms of the contract, and, therefore there

§ 394. Same. Items of account.

Additional matter to foot-note 133.⁵³

Additional matter to foot-note 135.⁵⁴

§ 395. Same. Nature of labor.

Additional matter to foot-note 138.⁵⁵

is ground for the contention that the declaration in the previous portion of the notice as to the promise to pay was intended to affirm an express agreement to have been made, to wit, 'upon completion of the work.' There is, indeed, evidence of an account stated, although the agreement was reached after the completion of the work. The exact time, however, is manifestly immaterial if, as it seems quite probable, this was the promise to which claimants referred in their said notice. By construing the phrase 'upon completion of the work' as fixing the time when the promise was made the said notice was rendered harmonious and consistent. At any rate, if there be such an uncertainty in this particular as to render the notice, if it were a complaint, subject to a special demurrer, in view of the circumstances already detailed, it would be technical in the extreme to hold the defect fatal to the lien. We have thus been led to follow what we conceive to be the just and reasonable rule laid down in the Porter case, *supra*, which upon examination will be found substantially in harmony with the supreme court decisions": *Lucas v. Rea*, 10 Cal. App. 641, 646, 647, 102 Pac. Rep. 822, 101 Pac. Rep. 537. See *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 764; *s. c.*, 9 Cal. App. 491, 99 Pac. Rep. 856; *s. c.*, sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

⁵³ *California*. See *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 232, 101 Pac. Rep. 691.

Colorado. Definition of account: See *Donley v. Bailey* (Colo.), 110 Pac. Rep. 65, 68.

Idaho. See *Naylor v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, 578; *s. c.*, 95 Pac. Rep. 827.

Account stated:

California. See *Stimson M. Co. v. Hughes*, 5 Cal. App. 559.

Montana. Rules concerning: *Johnson v. Gallatin Valley M. Co.*, 33 Mont. 83, 98 Pac. Rep. 883.

Copy of account not meaning items of account, compare *Moran v. Ebey*, 39 Mont. 517, 104 Pac. Rep. 522.

⁵⁴ *Kansas*. *Home L. & S. Co. v. School Dist.* (Kan.), 115 Pac. Rep. 590.

Montana. *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 356.

⁵⁵ *Montana*. Contra: *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 356.

New Mexico. But see *Gray v. New Mexico P. S. Co.* (N. M.), 110 Pac. Rep. 603, 604.

Oregon. *Washburn v. Intermountain M. Co.* (Oreg.), 109 Pac. Rep. 382, 385.

But see *Durkheimer v. Copperopolis C. Co.* (Oreg.), 104 Pac. Rep. 895, 897.

Oregon. See as to work on fixtures: *Rowen v. Alladio*, 51 Oreg. 121, 93 Pac. Rep. 929.

Additional matter to foot-note 139.⁵⁶

§ 396. Same. Dates.⁵⁷

§ 397. Same. "Time given."⁵⁷

§ 398. Same. "Cash."⁵⁷

§ 399. Description of property. In general. If there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient.⁵⁸

Additional matter to foot-note 154.⁵⁹

Additional matter to foot-note 155.⁶⁰

Additional matter to foot-note 156.⁶¹

§ 400. Same. Bona fide purchasers.

§ 401. Same. Object of provision.

§ 402. Same. General rule. Among the identifying facts which are held competent to be considered for determining the sufficiency of the claim of lien are references to adjoining properties, a description of the building which has been constructed, or the fact that the land upon which it is erected is the only property of the owner in that locality.⁶²

⁵⁶ Washington. But see, contra: McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 535, 537.

⁵⁷ Montana. Contra: McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 356.

⁵⁸ California. See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

⁵⁹ California. Patten & Davies L. Co. v. Gibson, 9 Cal. App. 23, 25, 98 Pac. Rep. 37, 38; Union L. Co. v. Simon, 150 Cal. 758, 89 Pac. Rep. 1077, 1081.

⁶⁰ Oregon. Description of logs: See Alderson v. Lee, 52 Oreg. 92, 96 Pac. Rep. 234, 236.

⁶¹ California. D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 92, 101 Pac. Rep. 38.

⁶² Utah. See Park City M. Co. v. Comstock S. M. Co. (Utah), 103 Pac. Rep. 254, 258.

⁶³ California. Patten & Davies L. Co. v. Gibson, 9 Cal. App. 23, 25, 98 Pac. Rep. 37, 38; Union L. Co. v. Simon, 150 Cal. 758, 89 Pac. Rep. 1077, 1081.

If the description in the claim of lien identifies the property by reference to the facts, that is, if it points clearly to a piece of property and there is no other one that will answer the description, it is sufficient.⁶³

Additional matter to foot-note 164.⁶⁴

Additional matter to foot-note 167.⁶⁵

§ 403. **Same. Special applications. False calls.** A description by the proper number of lot but in another block of the same tract was held insufficient, notwithstanding that the owner's contract thus incorrectly described it, and the owner informed the claimant, upon inquiry, that the description in the contract was correct; and the owner was held not estopped.⁶⁶

Additional matter to foot-note 168.⁶⁷

§ 404. **Same. Property identified by name or exclusive character.**

Additional matter to foot-note 171.⁶⁸

§ 405. **Same. Description as including too much or too little.**

Additional matter to foot-note 173.⁶⁹

⁶³ *California*. Patten & Davies L. Co. v. Gibson, 9 Cal. App. 23, 25, 98 Pac. Rep. 37, 38; Union L. Co. v. Simon, 150 Cal. 758, 89 Pac. Rep. 1077, 1081.

⁶⁴ *California*. See Patten & Davies L. Co. v. Gibson, 9 Cal. App. 23, 98 Pac. Rep. 37, 38.

⁶⁵ *California*. Patten & Davies L. Co. v. Gibson, 9 Cal. App. 23, 98 Pac. Rep. 37, 38.

⁶⁶ *California*. D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 92, 101 Pac. Rep. 38.

⁶⁷ *California*. As to mistake in block number, under pleadings: See Patten & Davies L. Co. v. Gibson, 9 Cal. App. 23, 98 Pac. Rep. 37. See following note.

⁶⁸ *California*. As to mistake in block number, lot described being owned by third person, and no identifying feature, insufficient: D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 91, 101 Pac. Rep. 38 (§ 1203a, Code Civ. Proc., subsequently passed). See preceding note.

⁶⁹ *Utah*. See Park City M. Co. v. Comstock S. M. Co. (Utah), 103 Pac. Rep. 254, 260.

Washington. Description of island, containing acreage owned by third person, insufficient: Brown v. Trimble, 48 Wash. 270, 93 Pac. Rep. 317.

Additional matter to foot-note 174.⁷⁰

Additional matter to foot-note 180.⁷¹

Additional matter to foot-note 181.⁷²

§ 406. Same. Two or more descriptions. Statutory provision.⁷³

§ 407. Same. Application of provision as to demands against separate buildings.

Additional matter to foot-note 187.⁷⁴

§ 408. Claim of charge.

§ 409. Signature. A claim of lien of a corporation may be signed in the name of the corporation, "by" a certain person, who is general manager of the company, and such person may verify it on behalf of the corporation.⁷⁵

§ 410. Verification. The purpose of the verification of the claim of lien is not to prove the lien when it is sought to enforce it in a court. It is required as an evidence of good faith and the prima facie support of his claim for the

⁷⁰ *Utah. Park City M. Co. v. Comstock S. M. Co. (Utah), 103 Pac. Rep. 254, 259.*

⁷¹ *Montana. McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 356.*

Utah. Park City M. Co. v. Comstock S. M. Co. (Utah), 103 Pac. Rep. 254, 261.

⁷² *Montana. McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 356.*

Utah. See Park City M. Co. v. Comstock S. M. Co. (Utah), 103 Pac. Rep. 254, 258.

⁷³ *California. § 1188, Code Civ. Proc., was not amended by act May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).*

⁷⁴ *Montana. See McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 357.*

Claim on one of group of mines: McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 357.

Oklahoma. But see Peaceable Creek C. Co. v. Jackson, 26 Okl. 1, 108 Pac. Rep. 409, 412.

⁷⁵ *California. Coghlan v. Quartararo (Cal. App.), 115 Pac. Rep. 664, 667.*

purpose of giving notice that the claimant intends to avail himself of his right to a lien, in the particular case.⁷⁶

Additional matter to foot-note 201.⁷⁷

Additional matter to foot-note 203.⁷⁸

Additional matter to foot-note 208.⁷⁹

Additional matter to foot-note 210.⁸⁰

Additional matter to foot-note 211.⁸¹

Additional matter to foot-note 213.⁸²

§ 411. Uncertainty in claim.⁸³

§ 412. Mistake and error in claim.⁸⁴

Additional matter to foot-note 217.⁸⁵

Additional matter to foot-note 218.⁸⁶

⁷⁶ **California.** *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476.

⁷⁷ **Oath taken over telephone void:** See *Fairbanks, Morse & Co. v. Getchell* (Cal. App.), 110 Pac. Rep. 331, 332; *Sullivan v. First Natl. Bank*, 37 Tex. Civ. App. 228, 83 S. W. Rep. 421.

As to signing affidavit: See *Fairbanks, Morse & Co. v. Getchell* (Cal. App.), 110 Pac. Rep. 331, 332 (attachment); *Ede v. Johnson*, 15 Cal. 53; *Pope v. Kirschner*, 77 Cal. 152, 19 Pac. Rep. 264.

Federal. See *Tygart Valley B. Co. v. Vilter Mfg. Co. (C. C. A.)*, 184 Fed. Rep. 845.

⁷⁸ **Oregon.** Compare *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202.

Notary public can not act outside of county, in absence of statutory permission: *Fairbanks, Morse & Co. v. Getchell* (Cal. App.), 110 Pac. Rep. 331, 332; *In re House Bill No. 166*, 9 Colo. 628, 21 Pac. Rep. 473; *Byrd v. Cochran*, 39 Neb. 109, 58 N. W. Rep. 127.

⁷⁹ **Washington.** *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

⁸⁰ **California.** Compare *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. Rep. 732.

⁸¹ **Jurat missing; evidence allunde:** See *James v. Logan*, 82 Kan. 285, 108 Pac. Rep. 81 (attachment).

Jurat held sufficient: See *Cunningham v. Barr*, 45 Kan. 158, 25 Pac. Rep. 583.

⁸² **California.** See *Coghlan v. Quartararo* (Cal. App.), 115 Pac. Rep. 664, 667; *A. P. Hotaling & Co. v. Brogan*, 12 Cal. App. 500, 107 Pac. Rep. 711.

⁸³ See § 412, post.

⁸⁴ **California.** See § 1203, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

⁸⁵ **Oregon.** See *Equitable S. & L. Assoc. v. Hewitt* (Oreg.), 106 Pac. Rep. 447, 451.

⁸⁶ **California.** See *D. I. Nofziger L. Co. v. Waters*, 10 Cal. App. 89, 91, 101 Pac. Rep. 38.

§ 413. Unnecessary statements.⁸⁷**§ 414. Same. Other illustrations.**

Additional matter to foot-note 226.⁸⁸

Additional matter to foot-note 227.⁸⁹

Additional matter to foot-note 229.⁹⁰

Additional matter to foot-note 231.⁹¹

§ 415. Amendment of claim.

Additional matter to foot-note 233.⁹²

⁸⁷ *California*. See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

⁸⁸ *Kansas*. Fossett v. Rock Island Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 835.

⁸⁹ *California*. Lucas v. Rea, 10 Cal. App. 641, 645, 102 Pac. Rep. 822, 101 Pac. Rep. 537; Stockton L. Co. v. Schuler, 155 Cal. 411, 414, 101 Pac. Rep. 307.

California. Lucas v. Gobbi, 10 Cal. App. 648, 651, 103 Pac. Rep. 157.

⁹⁰ *Oregon*. See Equitable S. & L. Assoc. (Oreg.), 106 Pac. Rep. 447, 451.

⁹¹ *Alaska*. Alaska P. M. Co. v. Delamotte (C. C. A.), 185 Fed. Rep. 752, 755.

Colorado. Barnes v. Colorado Springs & C. C. D. Ry. Co., 42 Colo. 461, 94 Pac. Rep. 570, 573.

Kansas. Home L. & S. Co. v. School Dist. (Kan.), 115 Pac. Rep. 590.

Oregon. See Alderson v. Lee, 52 Oreg. 92, 96 Pac. Rep. 234, 236.

Washington. Strandell v. Moran, 49 Wash. 533, 95 Pac. Rep. 1106; Bellingham v. Linck, 53 Wash. 208, 101 Pac. Rep. 843, 844.

⁹² *Washington*. Number of claims may be filed: Lindley v. McGlauffin, 58 Wash. 636, 109 Pac. Rep. 118; s. c., 57 Wash. 581, 107 Pac. Rep. 355.

Washington. Claim can not be amended without order of court, under statute; permission to amend complaint is not permission to amend claim of lien: Brown v. Trimble, 48 Wash. 270, 93 Pac. Rep. 317.

Amendment allowed under statute expressly authorizing same, no person being injured:

Oklahoma. Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 546.

Washington. Stetson & Post L. Co. v. W. & J. Sloane Co. (Wash.), 112 Pac. Rep. 248; Cornelius v. Washington S. L., 52 Wash., 272, 100 Pac. Rep. 727, 729; Malfa v. Crisp, 52 Wash. 509, 100 Pac. Rep. 1012 (number of lot in a certain block allowed to be changed); Lindley v. McGlauffin, 58 Wash. 636, 109 Pac. Rep. 118; s. c., 57 Wash. 581, 107 Pac. Rep. 355.

Such amendment may be allowed after the legal time for filing claim of lien: Stetson & Post L. Co. v. W. & J. Sloane Co., supra.

Claim may be amended as pleadings are: Malfa v. Crisp, supra.

Appellate court will treat defective claim as a defective pleading: Cornelius v. Washington S. L., 52 Wash. 272, 100 Pac. Rep. 727, 729.

CHAPTER XXI.

CLAIM OF LIEN (CONTINUED). FILING CLAIM.

§ 416. Filing claim. In general.

Additional matter to foot-note 1.¹Additional matter to foot-note 4.²

§ 417. Statutory provisions.

Additional matter to foot-note 7.³

§ 418. Purpose of provision requiring claims to be filed within a certain time.

Additional matter to foot-note 12.⁴§ 419. Same. In case of void contract.⁵§ 420. Place of filing claim for record.⁶

§ 421. Original contract void. Necessity of filing claim.

Additional matter to foot-note 19.⁷

¹ **Oklahoma.** Where the property is in the hands of a receiver and claims were presented to the court and heard by a referee and on an agreed statement of facts judgment was rendered, filing of formal claim unnecessary, where under the statute the claim would have to be filed with the clerk of the court: *Peaceable Creek C. Co. v. Jackson*, 26 Okl. 1, 108 Pac. Rep. 409, 412.

² See §§ 354 et seq., this Supplement, ante, and notes.

³ **California.** Amended by act of May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

⁴ **Oregon.** Compare *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

⁵ **California.** The statutory original contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

⁶ Compare "Filing Contract," §§ 294 et seq., Treatise, and Supplement.

⁷ **Colorado.** Compare *Foley v. Coon*, 41 Colo., 432, 93 Pac. Rep. 13, 14.

§ 422. Time of filing claim. In general.

Additional matter to foot-note 20.⁸

Additional matter to foot-note 21.⁹

§ 423. Same. Computation of time.

Additional matter to foot-note 24.¹⁰

§ 424. Time of filing, when not fixed by statute.¹¹**§ 425. Notice of completion or cessation of work. Statutory provision.**

Additional matter to foot-note 32.¹²

§ 426. Same. Purpose and scope of provision. Where the notice of completion is prematurely filed by the owner before actual completion or substantial completion, and the owner and claimant regard the work as not completed, the

⁸ **California.** *Hubbard v. Lee*, 10 Cal. App. 477, 480, 102 Pac. Rep. 528; s. c., 6 Cal. App. 602, 92 Pac. Rep. 744.

Colorado. *Rice v. Rhone* (Colo.), 111 Pac. Rep. 585, 588. But see *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

Kansas. *Badger L. Co. v. Martin* (Kan.), 112 Pac. Rep. 104; *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 835.

Oregon. *Grants Pass B. & T. Co. v. Empire M. Co.* (Oreg.), 113 Pac. Rep. 859. See *Equitable S. & L. Assoc. v. Hewitt* (Oreg.), 106 Pac. Rep. 447, 451.

Washington. *Pacific L. & T. Co. v. Dalley* (Wash.), 111 Pac. Rep. 869, 870.

⁹ **California.** *Hubbard v. Lee*, 10 Cal. App. 477, 480, 102 Pac. Rep. 528; s. c., 6 Cal. App. 602, 609, 92 Pac. Rep. 744; *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 484, 94 Pac. Rep. 773.

New Mexico. But see *Baldrige v. Morgan* (N. M.), 106 Pac. Rep. 342; *Nash v. Morgan* (N. M.), 106 Pac. Rep. 344; *Metz v. Romero* (N. M.), 106 Pac. Rep. 344.

Washington. *Lindley v. McGlaulin*, 58 Wash. 636, 109 Pac. Rep. 118; s. c., 57 Wash. 581, 107 Pac. Rep. 355.

¹⁰ **New Mexico.** See *Baldrige v. Morgan* (N. M.), 106 Pac. Rep. 342; *Nash v. Morgan* (N. M.), 106 Pac. Rep. 344; *Metz v. Romero* (N. M.), 106 Pac. Rep. 344.

Washington. *Cascade L. Co. v. Aetna I. Co.*, 56 Wash. 503, 106 Pac. Rep. 158; *Minneapolis S. & M. Co. v. Aetna I. Co.*, 56 Wash. 699, 106 Pac. Rep. 160.

¹¹ **California.** See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

¹² **California.** See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

filing of such notice does not afford the owner protection as a limitation of time for filing claims of lien.¹³

§ 427. **Same. Failure of owner to file notice.**¹⁴ Where no notice of completion was filed by the owner, owner's claimants could, before the amendment of 1911, file their claims of lien within ninety days after the actual completion, or 120 days from cessation of work, if the work was not actually completed, that is, ninety days after the cessation of work for thirty days.¹⁵

§ 428. **Same. In case of structures.** The time of filing a claim of lien by the owner's claimants before the amendments of 1911 to Code Civ. Proc. § 1187, did not run from the time of such claimants' ceasing work but from the time of the actual or constructive completion or from the cessation of work for thirty days, in the absence of a notice of completion or of cessation.¹⁶

Where several years were consumed in the alterations of a building and the work was done in a somewhat fragmentary manner, but was not done in separate and distinct sections, and material was not furnished under separate and distinct contracts, but the work was one entire undertaking, the time for filing claims commenced to run from the time when the alterations were actually or constructively completed.¹⁷

Additional matter to foot-note 42.¹⁸

¹³ California. *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 232, 101 Pac. Rep. 691. See *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 484, 94 Pac. Rep. 773; *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984.

¹⁴ California. See *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 269. See § 428, this Supplement, post.

¹⁵ California. *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 270, 96 Pac. Rep. 788.

¹⁶ California. *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 269.

¹⁷ California. *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 268, 96 Pac. Rep. 788 (before the amendments of 1911).

¹⁸ Original contractor:

Colorado. Three months after completion of building: *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

Oregon. After completion of his contract, and not after completion

Additional matter to foot-note 43.¹⁹
 Additional matter to foot-note 44.²⁰
 Additional matter to foot-note 45.²¹
 Additional matter to foot-note 48.²²
 Additional matter to foot-note 49.²³

§ 429. Same. General rule.

Additional matter to foot-note 52.²⁴

of building, time commences to run: Coffey v. Smith, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

19 Subcontractors:

Colorado. Within two months next after completion of building: Rice v. Rhone (Colo.), 111 Pac. Rep. 585, 588 (under § 4033, Rev. St. 1908), (3 Mill's Ann. St., Rev. Supp.); Foley v. Coon, 41 Colo. 432, 93 Pac. Rep. 13, 14 (under Sess. Laws 1899, p. 261, c. 118).

Kansas. During sixty days following furnishing of labor or material: Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 835.

New Mexico. See Baldrige v. Morgan (N. M.), 106 Pac. Rep. 342; Nash v. Morgan (N. M.), 106 Pac. Rep. 344; Metz v. Romero (N. M.), 106 Pac. Rep. 344.

Oregon. See Equitable S. & L. Assoc. v. Hewitt (Oreg.), 106 Pac. Rep. 447, 451.

20 Owner's material-man:

Washington. See Rieflin v. Grafton (Wash.), 115 Pac. Rep. 851.

21 Contractor's material-man:

Idaho. See Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24, 26; Valley L. Co. v. Driessel, 13 Idaho 662, 93 Pac. Rep. 765, 771.

Oregon. Thirty days after completion of building: Coffey v. Smith, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082 (under B. & C. Comp., § 5644).

Washington. Ninety days after the last item of material is sold and delivered: Rasmussen v. Liming, 50 Wash. 184, 96 Pac. Rep. 1044; Brown v. Trimble, 48 Wash. 270, 93 Pac. Rep. 317 (under Ballinger's Ann. Codes & Stats., § 5904).

22 Contractor's laborers:

Washington. See Brown v. Trimble, 48 Wash. 270, 93 Pac. Rep. 317.

23 California. Trifling imperfection in completion does not prevent time running within which to file claims of lien. Seebach v. Kuhn, 9 Cal. App. 485, 488, 99 Pac. Rep. 723.

See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

24 Colorado. Under Sess. Laws 1899, p. 26, c. 118, the principal contractor has three months after completion, and his subcontractors or "subcontractors" within two months after completion: Foley v. Coon, 41 Colo. 432, 93 Pac. Rep. 13, 14.

Idaho. Under one continuous contract for furnishing materials, time to file runs from last item of account: Valley L. Co. v. Driessel, 13 Idaho 662, 93 Pac. Rep. 765, 767; and see Darlington L. Co. v. Harris, 107 Mo. App. 148, 80 S. W. Rep. 688; but where material is fur-

§ 430. Time of filing claim. Certificate of architect.
Additional matter to foot-note 53.²⁵

§ 431. Same. Substantial or actual completion. The furnishing of materials gratuitously to replace defective material, or doing trifling work, is generally held not to operate to extend the time within which liens should be filed, particularly when it is in the nature of a subterfuge.²⁶ But in California it was held that where the work was part of that to be performed under the original contract, the contractor had the statutory period after the actual completion of a comparatively trifling part of the work within which to file his lien.²⁷ And if the owner claims that the work is not completed and some trifling work is done thereafter to complete, the owner is estopped to claim that the contract was previously completed.²⁸

If the owner enters into occupation of the improvements while the work of alteration is in active progress and about

nished for a structure apparently being erected under one original contract, but in reality under several, the material-man without notice may file his claim within the prescribed time after furnishing the last item, where the statute provides a limitation for filing claims after the last item: *Valley L. Co. v. Driessel*, supra; *Darlington L. Co. v. Harris*, supra. But if the material-man had notice of the several original contracts, he can not tack the last item of his account to the first to extend the time for filing claims of lien: *Valley L. Co. v. Driessel*, supra.

²⁵ Oregon. The delay in issuing arbitrator's certificate provided for by the contract does not extend the time to file claim: *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

²⁶ Idaho. *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 26; *Valley L. & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 Pac. Rep. 765.

Kansas. Badger L. Co. v. Parker (Kan.), 116 Pac. Rep. 242.

Nevada. Tonopah L. Co. v. Nevada A. Co., 30 Nev. 445, 97 Pac. Rep. 636, 639.

Oklahoma. Jones v. Balsley (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

Oregon. Crane Co. v. Ellis (Oreg.), 114 Pac. Rep. 475; *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

Washington. Rieflin v. Grafton (Wash.), 115 Pac. Rep. 851.

²⁷ California. *Rockwell v. Light*, 6 Cal. App. 563, 92 Pac. Rep. 649.

²⁸ California. As to estoppel of owner by statements relative to completion: See *Hubbard v. Lee*, 6 Cal. App. 602, 608, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 538.

half completed so that part can be occupied, the occupation of the building not being inconsistent with further work on the same, the time for filing liens does not start to run by reason of such occupation.²⁹

Additional matter to foot-note 54.³⁰

§ 432. Same. Abandonment of the work. Where the claim is filed within time after the actual completion of the building but is not filed within time after a notice of cessation and abandonment filed by the owner has set running the statutory time for filing the claim, the lien is lost.³¹

Additional matter to foot-note 57.³²

§ 433. Same. Thirty days' cessation from labor. Section 1187 of the Code of Civil Procedure, as it was amended in 1897 provided first, after declaring that trivial imperfections should not avail to avoid completion, that the occupation or use of a building, improvement or structure by the owner or his representative, together with cessation from labor for thirty days upon it, or, second, the acceptance by the owner or his agent of the building, together with cessation from labor for thirty days upon it, should, for the purposes of lien claimants, be deemed equivalent to a com-

²⁹ *California*, *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 269, 96 Pac. Rep. 728.

³⁰ *California*. See *Rockwell v. Light*, 6 Cal. App. 563, 92 Pac. Rep. 649. But see *Seebach v. Kuhn*, 9 Cal. App. 485, 488, 99 Pac. Rep. 723.

New Mexico. Time for filing subcontractor's claim does not commence to run from nor await the completion of the building; the statute fixes the time after which the claim can not be filed and does not fix the time during which it may be filed: *Baldrige v. Morgan* (N. M.), 106 Pac. Rep. 342; *Nash v. Morgan* (N. M.), 106 Pac. Rep. 344; *Metz v. Romero* (N. M.), 106 Pac. Rep. 344 (disclaiming California and Kansas doctrines as to premature filing, in this regard).

Oregon. But see *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

³¹ *California*. *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984, 986 (before the amendments of 1911).

³² *California*. See *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984, 988; and see § 433, this Supplement, post.

Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651, is overruled in *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984, 988, so far as repugnant. The latter case, however, was that of a valid contract.

pletion. Thus, while under the old law unfinished structures were deemed constructively completed when there had been cessation from labor for thirty days, under the law as amended in 1897, they were not deemed constructively completed, and the owner to set the time running for the filing of claims of lien had first to file his notice of cessation.

Again, under the law prior to 1897, either occupation or acceptance was deemed a completion which set in motion the time for filing claims; but under the amendment of 1897, either or both the occupation and the acceptance must be coupled with cessation from labor for thirty days upon the structure before the constructive completion was established and the time set running. Also, under the amendment of 1897, constructive completion by way of occupation or acceptance was made to apply to **all** cases, whether the work had been performed under contract or not, but under the law prior thereto, such constructive completion was declared to apply only "in case of contracts."³³

Additional matter to foot-note 59.³⁴

§ 434. Same. Agreements affecting time of filing claims. Giving credit.³⁵

§ 435. Same. Void contract.

Additional matter to foot-note 71.³⁶

Additional matter to foot-note 72.³⁷

³³ **California.** *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984, 987 (citing *Marble L. Co. v. Lordsburg H. Co.*, 96 Cal. 332, 81 Pac. Rep. 164). See *Baker v. Lake L. & I. Co.*, 7 Cal. App. 482, 94 Pac. Rep. 773 (use and occupation or acceptance must be coupled with cessation for thirty days to constitute constructive completion).

³⁴ **California.** See *Otis E. Co. v. Brainerd*, 10 Cal. App. 227, 232, 101 Pac. Rep. 691.

³⁵ See § 1187, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

³⁶ **California.** The Statutory Original Contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

Colorado. Compare *Foley v. Coon*, 41 Colo. 432, 98 Pac. Rep. 13, 14.

³⁷ **California.** See *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 269, 96 Pac. Rep. 728.

§ 436. Same. Mines and mining claims.

Additional matter to foot-note 78.³⁸

Additional matter to foot-note 83.³⁹

§ 437. Same. Grading, etc.⁴⁰

³⁸ **California.** Robison v. Mitchell (Cal. Sup.), 114 Pac. Rep. 984, 986.

³⁹ **New Mexico.** Owner's claimant, within ninety days after completion of contract: Gray v. New Mexico P. S. Co. (N. M.), 110 Pac. Rep. 603, 605.

⁴⁰ See, generally, §§ 133, 139, 156 and 166 et seq., Treatise and Supplement.

CHAPTER XXII.

LIMITATION ON LIENS. EXTENT OF LIENS.

§ 438. Territorial or "property" extent of lien.

Additional matter to foot-note 1.¹

Additional matter to foot-note 5.²

§ 439. Same. Statutory provision.³

§ 440. Same. Space for convenient use and occupation.

Additional matter to foot-note 10.⁴

Additional matter to foot-note 11.⁵

§ 441. Same. Structures. Illustrations.

§ 442. Same. Land affected when building is destroyed or removed.

Additional matter to foot-note 15.⁶

§ 443. Same. Mines and mining claims.

Additional matter to foot-note 16.⁷

¹ As to logger's lien: See *Alderson v. Lee*, 52 Oreg. 92, 96 Pac. Rep. 234, 236; *Grimm v. Pacific C. Co.*, 50 Wash. 415, 97 Pac. Rep. 297; *O'Connor v. Burnham*, 49 Wash. 443, 95 Pac. Rep. 1013.

As to lien extending to appurtenances: See *Park City M. Co. v. Comstock S. M. Co. (Utah)*, 103 Pac. Rep. 254, 260.

² *Montana*. Definition of "property": See *Helena W. Co. v. Settles*, 37 Mont. 237, 95 Pac. Rep. 838.

³ *California*. See § 1185, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

⁴ *Utah*. *Park City M. Co. v. Comstock S. M. Co. (Utah)*, 103 Pac. Rep. 254, 259.

⁵ *Alaska*. Lien can not include another structure against which claim of lien has not been filed, and for which materials not furnished or used: *Burr v. House*, 3 Alaska 641, 649.

Utah. *Volker-Scowcroft L. Co. v. Vance (Utah)*, 103 Pac. Rep. 970, 974; s. c., 33 Utah 74, 88 Pac. Rep. 896.

⁶ *California*. *Watson v. Alta I. Co.*, 12 Cal. App. 560, 564, 108 Pac. Rep. 48; *Watson v. Alta I. Co.*, 12 Cal. App. 566, 108 Pac. Rep. 50.

Montana. See *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

Utah. Compare *Park City M. Co. v. Comstock S. M. Co. (Utah)*, 103 Pac. Rep. 254, 259.

⁷ Compare *Park City M. Co. v. Comstock S. M. Co. (Utah)*, 103 Pac. Rep. 254, 259.

§ 444. Same. Several mining claims.Additional matter to foot-note 18.⁸**§ 445. Same. Mining machinery.**Additional matter to foot-note 19.⁹Additional matter to foot-note 22.¹⁰Additional matter to foot-note 23.¹¹**§ 446. Same. Grading and other work. Lot.¹²****§ 447. Property viewed as an entirety.**Additional matter to foot-note 28.¹³Additional matter to foot-note 29.¹⁴Additional matter to foot-note 30.¹⁵Additional matter to foot-note 31.¹⁶**§ 448. Same. Distinct objects on one parcel of land.****§ 449. Same. Railroads, canals, gas-works and water-works.**Additional matter to foot-note 34.¹⁷

⁸ **Montana.** McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 357.

Oklahoma. But see Peaceable Creek C. Co. v. Jackson, 26 Okl. 1, 108 Pac. Rep. 409, 412.

⁹ **New Mexico.** Mine held as required for the convenient use and occupation of mill for which material was furnished: Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co., 14 N. M. 300, 93 Pac. Rep. 706, 710.

¹⁰ **Utah.** See Park City M. Co. v. Comstock S. M. Co. (Utah), 103 Pac. Rep. 254, 257.

¹¹ **Utah.** Compare Park City M. Co. v. Comstock S. M. Co. (Utah), 103 Pac. Rep. 254, 258.

¹² **California.** § 1191, Code Civ. Proc., was not amended by act May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

¹³ **Idaho.** See Steltz v. Armory Co., 15 Idaho 551, 99 Pac. Rep. 98, 101.

Montana. Extent of lien in case other than mine: See McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 356.

¹⁴ **Colorado.** Barnes v. Colorado Springs & C. C. D. Ry. Co., 42 Colo. 461, 94 Pac. Rep. 570, 573.

¹⁵ **Colorado.** Lien is on entire railroad; claim of lien need not segregate amount in each county: Barnes v. Colorado Springs & C. C. D. Ry. Co., 42 Colo. 461, 94 Pac. Rep. 570, 573.

¹⁶ **Washington.** See Cornelius v. Washington S. Laundry, 52 Wash. 272, 100 Pac. Rep. 727, 729.

¹⁷ **Colorado.** See Barnes v. Colorado Springs & C. C. D. Ry. Co., 42 Colo. 461, 94 Pac. Rep. 570, 573.

Additional matter to foot-note 36.¹⁸

§ 450. Same. Lien on building alone. False representations as to ownership.

§ 451. Same. Mining claims and mines.

Additional matter to foot-note 38.¹⁹

Idaho. *Naylor v. Lewiston & S. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, 578; s. c., 95 Pac. Rep. 827.

Washington. Lien on buildings, structures, ditches, etc., constituting a power and irrigation plant: See *Gilbert-Hunt Co. v. Parry* (Wash.), 110 Pac. Rep. 541, 542.

¹⁸ **New Mexico.** See *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710.

¹⁹ **Montana.** As to rule now provided by § 7293, Rev. Codes, as to extent of lien on mining claims: See *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 356. Claim need not be limited to specific portion of property on which work was done: *McIntyre v. Montana G. M. M. Co.*, supra.

New Mexico. *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710.

Oregon. See *Escott v. Crescent C. & N. Co.* (Oreg.), 106 Pac. Rep. 452, 454, 455.

Utah. *Park City M. Co. v. Comstock S. M. Co.* (Utah), 103 Pac. Rep. 254, 261.

Utah. "Taking the lien in question as an illustration, if any one had furnished material for the shafthouse and hoisting works and had filed a lien upon these structures alone, and this were permitted, the very entrance to the mine could be disconnected from the mine itself. The shafthouse and hoisting works would thus become useless without the mine, and it would be a useless thing without an entrance thereto. If a portion of the mine may be thus segregated, it may result in dismembering and in effect destroying almost the entire value of the mine as such. No one would contend that, if a mechanic had made repairs upon an expensive entrance to a hotel or other private structure, such as the heating plant connected with such structure, he could claim a lien upon the entrance or heating plant alone, and in enforcing the lien could, by judicial process, sell the entrance or heating plant to one person while the main structure belonged to another, and in this way practically destroy the use of the entire structure until the owner, or some purchaser of the main structure, yielded to the terms of the purchaser of the entrance or heating plant. The doctrine which, for the purpose of mechanics' liens, treats mines and mining claims that are being actively operated and worked as a unit the same as other structures, is so manifestly just and equitable, and so well responds to the general utility involved, that it seems like a work of supererogation to present any arguments or reasons why it should prevail. It has, however, been held that for improvements made on a mill site no lien can ordinarily be acquired against a mine or mining claim. *Colorado Iron Works v. Taylor*, 12 Colo. App. 451, 55 Pac. Rep. 942. This ruling is based upon the ground that neither the mill nor mill site is necessarily a part of the mine. In this case it was not shown what kind of a mill it was,

Additional matter to foot-note 39.²⁰

§ 452. The lien as limited by contract.²¹

§ 453. Same. Statutory provision.²¹

§ 454. Same. General interpretation of provision.

Additional matter to foot-note 46.²²

Additional matter to foot-note 47.²³

§ 455. Same. Contract as notice. Where the subcontractor agrees to perform the work under the original contract, the terms and conditions of which are made a part of the subcontract, if the contractor can not recover on the original contract by reason of the destruction of the building before completion, the subcontractor can not recover against the contractor.²⁴

Additional matter to foot-note 49.²⁵

except that it was erected on the mining claims, and thus became a part of the mining claims; and hence the rule announced in the Colorado case did not apply": *Park City M. Co. v. Comstock S. M. Co.* (Utah, June 12, 1909), 103 Pac. Rep. 254, 261.

²⁰ *Montana*. Compare *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

Utah. Compare *Park City M. Co. v. Comstock S. M. Co.* (Utah), 108 Pac. Rep. 254, 261.

²¹ *California*. See § 1183, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

²² *California*. *McCue v. Jackman*, 7 Cal. App. 703, 95 Pac. Rep. 673; *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

Colorado. As to abandonment: See *Rice v. Rhone* (Colo.), 111 Pac. Rep. 585, 587.

Kansas. *Wichita S. & D. Co. v. Well*, 80 Kan. 606, 103 Pac. Rep. 1003, 1005; *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 836.

Oklahoma. *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

Washington. But see *Rieflin v. Grafton* (Wash.), 115 Pac. Rep. 851, 853.

²³ *California*. *Stockton L. Co. v. Schuler*, 155 Cal. 411, 412, 101 Pac. Rep. 307; *D. L. Nofziger L. Co. v. Waters*, 10 Cal. App. 89, 92, 101 Pac. Rep. 38.

Kansas. *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 835.

²⁴ *California*. *Watson v. Alta I. Co.*, 12 Cal. App. 560, 565, 108 Pac. Rep. 48; *Watson v. Alta I. Co.*, 12 Cal. App. 566, 108 Pac. Rep. 50.

²⁵ *Oregon*. Compare *Crane Co. v. Erie H. Co.* (Oreg.), 112 Pac. Rep. 430.

§ 456. Same. Price. Value.

Additional matter to foot-note 52.²⁶

§ 457. Same. Contract of subcontractor and contractor.

Additional matter to foot-note 53.²⁷

§ 458. Same. Claimants under subcontractors.

Additional matter to foot-note 54.²⁸

²⁶ "Price" as indicating money or some other equivalent in contract for sale of mine: Compare *Kinard v. Jordan*, 10 Cal. App. 219, 101 Pac. Rep. 696, 698.

²⁷ *Oregon*. Compare *Crane Co. v. Erie H. Co. (Oreg.)*, 112 Pac. Rep. 430.

²⁸ *Idaho*. *Steltz v. Armory Co.*, 15 Idaho 551, 99 Pac. Rep. 98, 100.

CHAPTER XXIII.

LIMITATIONS ON LIENS (CONTINUED). ESTATES AND INTERESTS SUBJECT TO LIENS.

I. BY CONTRACT.

§ 459. Plan of discussion.

§ 460. Estates or interests bound by contractual relation with the holder thereof. Statutory provision.

Additional matter to foot-note 3.¹

§ 461. Same. General rule.

Additional matter to foot-note 4.²**¹ Husband and wife:****Federal.** See *Healey I. M. Co. v. Green* (C. C., N. C.), 181 Fed. Rep. 890.**Kansas.** Transfer of owner's account to name of husband: See *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 81.**Husband as agent of wife:** See *Chicago L. & C. Co. v. Washington*, *supra*.**Acquirement of other interests by wife:** See *Robert Garrett L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 181.**Oklahoma.** Husband as agent of wife: *Bloch v. Pearson*, 19 Okl. 422, 91 Pac. Rep. 714.**Husband's interest also bound:** See *Bloch v. Pearson*, *supra*.**² Arizona:** Lien not given on mere option on mining property: *Harper v. Independence D. Co.* (Ariz.), 108 Pac. Rep. 701, 704.**California.** Right of possession to mine for oil, real estate: *Graciosa O. Co. v. Santa Barbara County*, 155 Cal. 140, 99 Pac. Rep. 483, 486 (regarding taxation).**Colorado.** Right to use water for irrigation, real estate: *Davis v. Randall*, 44 Colo. 488, 99 Pac. Rep. 322, 324.**Idaho.** Title subject to be defeated upon condition subsequent: *Naylor v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, 578, 95 Pac. Rep. 827.**Rights held under Carey Act for construction of canal:** *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 792, 92 Pac. Rep. 980.**Leasehold or other estate:** *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, *supra*.**Possessory rights of locator on mining property, fee in Federal government:** *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 792, 92 Pac. Rep. 980.**Husband and wife:****Idaho.** See *Larson v. Carter*, 14 Idaho 511, 94 Pac. Rep. 825.

Additional matter to foot-note 5.³

§ 462. Same. Fee or legal title subject to lien.

Additional matter to foot-note 6.⁴

§ 463. Same. Vendee being in possession.

Additional matter to foot-note 8.⁵

Kansas. Badger L. Co. v. Malone, 8 Kan. App. 692, 54 Pac. Rep. 692; Chicago L. Co. v. Osborn, 40 Kan. 168, 19 Pac. Rep. 656; Robert Garrett L. Co. v. Loftus, 82 Kan. 556, 109 Pac. Rep. 179, 181.

Husband and wife: See Robert Garrett L. Co. v. Loftus, 82 Kan. 556, 109 Pac. Rep. 179, 180.

Where a person is in undisputed possession under a claim of right of possession when the improvement is made, in the absence of a contrary showing, a conveyance will be held to be a ratification of a prior equitable title, or merging in the legal title, and the lien will be held to attach to the whole estate: Robert Garrett L. Co. v. Loftus, 82 Kan. 556, 109 Pac. Rep. 179, 181, explaining Lumber Co. v. Fretz, 51 Kan. 134, 32 Pac. Rep. 908.

Oklahoma. Bloch v. Pearson, 19 Okl. 422, 91 Pac. Rep. 714.

Interest of lessee of school lands, fee in United States: Bloch v. Pearson, 19 Okl. 422, 91 Pac. Rep. 714; Jarrell v. Block, 19 Okl. 467, 92 Pac. Rep. 167; Crutcher v. Bloch, 19 Okl. 246, 91 Pac. Rep. 895.

Oregon. Alaska P. Co. v. Bingham (Oreg.), 115 Pac. Rep. 159, 160.

It is always in the power of the claimant to ascertain the interest therein of the person with whom he is contracting, and if he neglects this necessary precaution, the courts ought to allow him to suffer the consequences of his negligence, rather than to saddle the loss upon innocent parties by a forced construction of the law: Alaska P. Co. v. Bingham (Oreg.), 115 Pac. Rep. 159, 160.

Arizona. Owner of mere option neither vendee nor agent of owner: Harper v. Independence D. Co. (Ariz.), 108 Pac. Rep. 701, 704.

Kansas. Potter v. Conley (Kan.), 112 Pac. Rep. 608.

But mere license to explore for minerals, and take oil as personal property, only incorporeal hereditament, profit a prendre: See Phillips v. Springfield C. O. Co., 76 Kan. 783, 92 Pac. Rep. 1119; Martin v. Springfield C. O. Co., 77 Kan. 851, 92 Pac. Rep. 1119.

Oklahoma. Tenancy from month to month; estate for life or years, mortgagor's right of redemption, interest of person in possession claiming title: See Crutcher v. Bloch, 19 Okl. 246, 91 Pac. Rep. 895.

⁴ **Kansas.** But see Robert Garrett L. Co. v. Loftus, 82 Kan. 556, 109 Pac. Rep. 179, 181.

⁵ **Colorado.** As to first Colorado note, see Hall v. Cudahy, 46 Colo. 324, 104 Pac. Rep. 415 (regarding Shapleigh v. Hull, 21 Colo. 419, 41 Pac. Rep. 1108, interest of both vendor and vendee bound).

Oregon. See Alaska P. Co. v. Bingham (Oreg.), 115 Pac. Rep. 159.

Utah. Belknap v. Condon, 34 Utah, 213, 97 Pac. Rep. 111, 114.

Claimant can not change account from constructing vendee to vendor: Belknap v. Condon, 34 Utah, 213, 97 Pac. Rep. 111, 114.

A mere expectation by the owner that the purchaser will make improvements is not sufficient to establish the relation of principal and agent between the vendor and vendee, so as to impose a lien upon the interest of the vendor; nor would mere permission by the vendor

§ 464. Same. Lessee being in possession.Additional matter to foot-note 10.⁶Additional matter to foot-note 14.⁷**§ 465. Same. Title being held in trust.**Additional matter to foot-note 11.⁸**§ 466. Same. Interest of vendee in possession bound.**Additional matter to foot-note 12.⁹**§ 467. Same. Interest of lessee bound.**Additional matter to foot-note 14.¹⁰

to the vendee to make such improvements, nor would mere knowledge or acquiescence on the part of the owner: *Belknap v. Condon*, 34 Utah 213, 97 Pac. Rep. 111, 114.

⁶ *Arizona. Contra*, as to mere option: *Harper v. Independence D. Co.* (Ariz.), 108 Pac. Rep. 701, 704.

Kansas. Estate of owner not subject to lien, unless lessee, agent or trustee of the owner: *Potter v. Conley* (Kan.), 112 Pac. Rep. 608 (under § 649, Code Civ. Proc.—Gen. Stat. 1909, § 6244).

Oil or gas lease conveying no present vested interest in the oil and gas in place, not subject to lien: *Phillips v. Springfield C. O. Co.*, 76 Kan. 783, 92 Pac. Rep. 1119; *Martin v. Springfield C. O. Co.* 77 Kan. 851, 92 Pac. Rep. 1119.

Utah. Belknap v. Condon, 34 Utah 213, 97 Pac. Rep. 111, 113, 114 (under § 1372, Cop. Laws 1907).

Washington. Shaw v. Spencer, 57 Wash. 587, 107 Pac. Rep. 383.

Interest of lessor (fee) bound; interest of lessee not bound: See *Housekeeper v. Livingstone*, 48 Wash. 209, 93 Pac. Rep. 217.

Obligation to repair on lessee, unless otherwise expressly agreed: *Hockersmith v. Ferguson* (Wash.), 116 Pac. Rep. 11.

Where lessee repairs, lien subject to conditions of lease and subordinate to rights of lessor: *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

⁷ *Oklahoma. But see Christy v. Union O. & G. Co.* (Okl.), 104 Pac. Rep. 740; *Shirley v. Union O. & G. Co.* (Okl.), 104 Pac. Rep. 742.

⁸ *Colorado. See Hall v. Cudahy*, 46 Colo. 324, 104 Pac. Rep. 415, following *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. Rep. 1108.

⁹ *Colorado. See Hall v. Cudahy*, 46 Colo. 324, 104 Pac. Rep. 415 (lien against interest of both vendor and vendee).

Kansas. Forfeiture of contract of sale: See *Badger L. Co. v. Parker* (Kan.), 116 Pac. Rep. 242.

Oregon. Forfeited interest: See *Alaska P. Co. v. Bingham* (Oreg.), 115 Pac. Rep. 159.

¹⁰ *Arizona. Lien not upon mere option on mining property*: *Harper v. Independence D. Co.* (Ariz.), 108 Pac. Rep. 701, 704.

Montana. See McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353, 357.

Utah. Belknap v. Condon, 34 Utah 213, 97 Pac. Rep. 111, 113, 114 (under § 1372, Comp. Laws 1907).

Additional matter to foot-note 18.¹¹

Additional matter to foot-note 19.¹²

§ 468. Same. Homestead bound.

Additional matter to foot-note 20.¹³

Additional matter to foot-note 21.¹⁴

Oklahoma. Crutcher v. Bloch, 19 Okl. 246, 91 Pac. Rep. 895; Jarrell v. Block, 19 Okl. 467, 92 Pac. Rep. 167; Christy v. Union O. & G. Co. (Okl.), 114 Pac. Rep. 740; Shirley v. Union O. & G. Co. (Okl.), 114 Pac. Rep. 742.

Washington. Owen v. Casey, 48 Wash. 673, 94 Pac. Rep. 473 (clearing land). But contra, where lessor makes repairs: See Housekeeper v. Livingstone, 48 Wash. 209, 93 Pac. Rep. 217, 219.

See Cornelius v. Washington S. L., 52 Wash. 272, 100 Pac. Rep. 727, 729.

See § 464, this Supplement, ante, and notes.

¹¹ **Kansas.** Lien on defaulted lease, valueless: Potter v. Conley (Kan.), 112 Pac. Rep. 608.

Montana. Contract of lease held option which is strictly construed: Snider v. Yarmouth (Mont.), 115 Pac. Rep. 411.

Washington. Cornelius v. Washington S. L., 52 Wash. 272, 100 Pac. Rep. 727, 729.

¹² **Washington.** See Cornelius v. Washington S. L., 52 Wash. 272, 100 Pac. Rep. 727, 729.

¹³ **Oklahoma.** No lien upon homestead of Chickasaw Indian: See Keel v. Ingersoll (Okl.), 111 Pac. Rep. 214.

Utah. See Volker-Scowcroft L. Co. v. Vance (Utah), 103 Pac. Rep. 970, 973; s. c., 33 Utah 74, 88 Pac. Rep. 896.

¹⁴ See also § 460, ante, and §§ 470 and 571, post, Treatise and this Supplement.

Utah. Volker-Scowcroft L. Co. v. Vance (Utah), 103 Pac. Rep. 970, explaining s. c., 32 Utah 74, 88 Pac. Rep. 896.

Washington. Olson v. Goodsell, 56 Wash. 251, 105 Pac. Rep. 463.

CHAPTER XXIV.

LIMITATIONS ON LIENS (CONTINUED). ESTATES AND INTERESTS SUBJECT TO LIENS.

II. BY ESTOPPEL. NOTICE OF NON-RESPONSIBILITY.

§ 469. Estates or interests bound by estoppel. Scope of discussion. The doctrine upon which rest statutory provisions relating to the posting or filing of a notice of non-responsibility by the owner to protect his property from liens for labor material for the construction of a building thereon is that of estoppel.¹

Additional matter to foot-note 2.²

Additional matter to foot-note 3.³

§ 470. Same. The general principles of estoppel in pais. Additional matter to foot-note 5.⁴

§ 471. Same. Independently of statute. Additional matter to foot-note 6.⁵

¹ **California.** John R. Gentle & Co. v. Britton, 158 Cal. 328, 332, 111 Pac. Rep. 9; s. c. (Cal. App.), 8 Cal. App. Dec. 350. Some of the language of this opinion relative to an "equitable lien" being created is unfortunate.

² See Agency, §§ 572 et seq., this Supplement, post.

³ See § 470, this Supplement, post.

⁴ **California.** John R. Gentle & Co. v. Britton, 158 Cal. 328; 332, 111 Pac. Rep. 9; s. c. (Cal. App.), 8 Cal. App. Dec. 350.

Principles of equitable estoppel:

Kansas. See Dent v. Smith, 76 Kan. 381, 92 Pac. Rep. 307.

Oklahoma. By silence: See Bragdon v. McShea (Okla.), 107 Pac. Rep. 916.

Oregon. See State v. Portland G. E. Co., 52 Oreg. 502, 95 Pac. Rep. 722.

Washington. See Caruthers v. Whitney, 56 Wash. 327, 105 Pac. Rep. 831.

⁵ **Husband and wife as agents of each other:**

Federal. See Healey I. M. Co. v. Green (C. C., N. C.), 181 Fed. Rep. 890.

Kansas. See Robert Garrett L. Co. v. Loftus, 82 Kan. 556, 109 Pac. Rep. 179, 181; Chicago L. & C. Co. v. Washington, 80 Kan. 613, 103 Pac. Rep. 80, 81.

Kansas. Repairs by co-tenant: Leaving out of account necessary repairs and improvements essential to the preservation of the prop-

Additional matter to foot-note 7.⁶

§ 472. **Same. General rule as to when notice of non-responsibility must be given.** But a notice of non-responsibility obviously can not be given prohibiting what has already been accomplished.⁷

§ 473. **Same. Notice of non-responsibility. Statutory provision.**⁸

§ 474. **Same. Purpose of provision as to notice of non-responsibility.**⁸

§ 475. **Same. Notice or knowledge of improvement.** Under the statute requiring the owner to give notice of non-responsibility, if the construction is already completed, it is obvious that knowledge subsequently acquired would be of no avail to the owner, and no such notice would be required.⁹ Where the lessee is the mere agent of the owner

erty, one tenant in common can not by his own contract alone subject the interest of his co-tenants to a mechanics' lien: *Robert Garrett L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 181 (case of husband as statutory agent of wife). See *Mellor v. Valentine*, 3 Colo. 260; *Seel v. Nell*, 37 Colo. 198, 86 Pac. Rep. 334; *Conrad v. Starr*, 50 Iowa 470, 481; *Woodburn v. Gifford*, 77, Ill. 285; *Leslie v. Leonard*, 10 Pa. Super. Ct. 548.

Change of account from name of agent to principal: See *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 81.

Oklahoma. See *Bloch v. Pearson*, 19 Okl. 422, 91 Pac. Rep. 714.

Utah. A fortiori, no lien when the owner has a mere expectation that the building will be constructed: *Belknap v. Condon*, 34 Utah 213, 97 Pac. Rep. 111, 114. See *Sheehy v. Fulton*, 38 Neb. 691, 57 N. W. Rep. 395, 41 Am. St. Rep. 767.

Washington. Even where the lessee directs the claimant to proceed with the repairs ordered by the lessor, interest of lessee not bound: *Housekeeper v. Livingstone*, 48 Wash. 209, 93 Pac. Rep. 217, 219.

⁶ **Kansas.** See *Robert Garrett L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 180, 181.

⁷ **California.** *John R. Gentle & Co. v. Britton*, 158 Cal. 328, 111 Pac. Rep. 9; s. c. (Cal. App.), 8 Cal. App. Dec. 350.

⁸ **California.** See § 1192, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.). Verification and recording of notice, among other things, now required.

⁹ **California.** *John R. Gentle & Co. v. Britton*, 158 Cal. 328, 111 Pac. Rep. 9; s. c. (Cal. App.), 8 Cal. App. Dec. 350.

in the erection and construction of the building, such owner is not entitled to give the notice of non-responsibility provided in the statute.¹⁰

The general rule that knowledge of the agent is knowledge of the principal, within the scope of the agency, applies to knowledge of the construction of a building; thus when an agent having charge of property has notice during the progress of the work of construction that the vendee in possession is making repairs, this is notice to the owner.¹¹ The knowledge upon the owner's part which is sufficient to place him in default for failure to give the notice of non-responsibility required by the statute need not be absolute; it is enough if it would put a prudent man upon inquiry.¹²

Additional matter to foot-note 15.¹³

Additional matter to foot-note 16.¹⁴

Additional matter to foot-note 17.¹⁵

¹⁰ **California.** *Western L. & M. Co. v. Merchants' A. Co.*, 13 Cal. App. 4, 108 Pac. Rep. 891, 894 (hearing in Supreme Court denied). In this case it was also said that if the owner has knowledge of the intention to build, he must act upon that knowledge, and within three days post the notice; if he has no knowledge of the intention, he must move with like promptness upon obtaining knowledge of the construction. But see § 484, Treatise and this Supplement, post.

¹¹ **California.** *Pacific L. Co. v. Wilson*, 6 Cal. App. 561, 562, 92 Pac. Rep. 654.

California. Whether necessary to give notice if knowledge is obtained after completion not determined: *Pacific L. Co. v. Wilson*, 6 Cal. App. 561, 562, 92 Pac. Rep. 654.

If the owner received knowledge from any source as to the construction, constructive notice received by him by reason of knowledge of his agent of the construction can not arise; and the knowledge of the agent would be important only when the owner does not receive such notice as would put a prudent man upon inquiry: *John R. Gentle & Co. v. Britton*, 158 Cal. 328, 332, 111 Pac. Rep. 9.

¹² **California.** *John R. Gentle & Co. v. Britton*, 158 Cal. 328, 332, 111 Pac. Rep. 9; s. c. (Cal. App.), 8 Cal. App. Dec. 350; and see *Evans v. Judson*, 120 Cal. 282, 284.

¹³ **California.** See *Pacific L. Co. v. Wilson*, 6 Cal. App. 561, 562, 92 Pac. Rep. 654.

Colorado. See *Hall v. Cudahy*, 46 Colo. 324, 104 Pac. Rep. 415.

Nevada. *Tonopah L. Co. v. Nevada A. Co.*, 30 Nev. 445, 97 Pac. Rep. 636, 639.

¹⁴ **Utah.** Compare *Belknap v. Condon*, 34 Utah 213, 97 Pac. Rep. 111, 113, 114.

¹⁵ **Washington.** See *Wetzler v. Nichols*, 53 Wash. 285, 101 Pac. Rep. 867, 868.

As to implied notice: See *Hawkes v. Hoffman*, 56 Wash. 120, 105 Pac. Rep. 156, 158.

§ 476. Same. Notice to corporation as owner.

Additional matter to foot-note 18.¹⁶

§ 477. Same. Lessee in possession and making improvements.

Additional matter to foot-note 20.¹⁷

Additional matter to foot-note 21.¹⁸

§ 478. Same. Vendee being in possession. The interest of the vendor of real property may be bound for improvements made by a vendee in possession, of which the vendor has knowledge, if the latter does not give the notice of non-responsibility, required by the statute.¹⁹

Additional matter to foot-note 22.²⁰

§ 479. Same. When notice not required. The notice of non-responsibility is not required when the knowledge comes to the owner after the completion of the construction.²¹

Additional matter to foot-note 25.²²

§ 480. Same. When notice not required in case of mines and mining claims.²³

§ 481. Same. Notice not required in case of grading and other work in incorporated cities.²³

¹⁶ *New Mexico.* Likewise, notice to general manager of corporation, is notice to the corporation: *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 713.

¹⁷ *Washington.* See *Wetzler v. Nichols*, 53 Wash. 285, 101 Pac. Rep. 876, 878.

¹⁸ *California.* See § 475, this Supplement, ante.

¹⁹ *California.* *Pacific L. Co. v. Wilson*, 6 Cal. App. 561, 92 Pac. Rep. 654.

²⁰ *Colorado.* See *Hall v. Cudahy*, 46 Colo. 324, 104 Pac. Rep. 415.

Utah. Compare *Belknap v. Condon*, 34 Utah 213, 97 Pac. Rep. 111, 114.

²¹ *California.* *John R. Gentle & Co. v. Britton*, 158 Cal. 328, 111 Pac. Rep. 9; s. c., 8 Cal. App. Dec. 350.

²² *California.* Unborn contingent remainder-man giving notice: See *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. Rep. 640, 649, 109 Pac. Rep. 650.

²³ *California.* But see § 1192 Code Civ. Proc., as amended May 1, 1911 (Stats. and Amdts. 1911, pp. 1313, et seq.).

§ 482. **Same. Notice not required in case of prior liens.**

Additional matter to foot-note 41.²⁴

Additional matter to foot-note 42.²⁵

§ 483. **Same. Effect of knowledge of claimant of lack of authority of person making improvement.**

Additional matter to foot-note 43.²⁶

§ 484. **Same. Notice, when to be posted.** The law does not say that upon the posting of the notice the owner will not be liable for any labor performed or material furnished thereafter, but that if he fails to post such notice within the statutory time after knowledge that the improvement was being made, it shall be held to have been constructed at his instance. There is no limitation in respect to the stage of the work at the time at which the notice must be posted. The statutory provision would be complied with by posting on the same day the improvements are begun, if this is within three days after knowledge was obtained, either in the construction or intended construction. And, if done within three days after knowledge received, the notice will be timely upon any day when the work on the improvement was in progress.²⁷

Holidays. Conceding that continuance of holidays declared by the governor consisting of part of the time work was being done postponed the owner's right to avail himself of the notice of non-responsibility prescribed by the statute, the completion of the work during the holidays would not render such notice nugatory when the holidays had

²⁴ **New Mexico.** Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co., 14 N. M. 300, 93 Pac. Rep. 706, 712, 713.

²⁵ **New Mexico.** Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co., 14 N. M. 300, 93 Pac. Rep. 706, 712, 713.

²⁶ **Washington.** Against the authority and consent of owner, a lien for grading can not be acquired; and the owner was held not estopped, although three-quarters of grading had been done: Erickson v. Hochbrune, 47 Wash. 33, 91 Pac. Rep. 485 (statutory notice of non-responsibility not involved).

²⁷ **California.** John R. Gentle & Co. v. Britton, 158 Cal. 328, 332, 111 Pac. Rep. 9 (on hearing in Supreme Court, after decision in the Court of Appeals). See note 23, this chapter, ante.

ended, even if the work were commenced after a series of consecutive holidays were declared; and the owner must post such notice upon the first secular day after his discovery of the activities of the laborers who subsequently become lien claimants.²⁸

Additional matter to foot-note 44.²⁹

Additional matter to foot-note 45.³⁰

Additional matter to foot-note 46.³¹

§ 485. Same. Notice how posted. Conspicuous place.

Additional matter to foot-note 48.³²

²⁸ California. John R. Gentle & Co. v. Britton, 158 Cal. 328, 330, 111 Pac. Rep. 9; s. c., 8 Cal. App. Dec. 350. The question of the effect of the holidays held not to arise, owing to failure to post notice of non-responsibility on the first day succeeding the holidays. Id., p. 331.

²⁹ California. See John R. Gentle & Co. v. Britton, 158 Cal. 328, 111 Pac. Rep. 9; s. c., 8 Cal. App. Dec. 350.

See §§ 472, 475 and 479, this Supplement, ante.

³⁰ California. John R. Gentle & Co. v. Britton, 158 Cal. 328, 332, 111 Pac. Rep. 9 (on hearing in Supreme Court after decision in Court of App.).

But see, contra: Western L. & M. Co. v. Merchants' A. Co., 13 Cal. App. 4, 108 Pac. Rep. 891, 894.

³¹ California. John R. Gentle & Co. v. Britton, 158 Cal. 328, 332, 111 Pac. Rep. 9 (on rehearing in Supreme Court).

"Day appointed by law"—holiday: See John R. Gentle & Co. v. Britton, 158 Cal. 328, 111 Pac. Rep. 9; s. c., 8 Cal. App. Dec. 350.

See § 475, this Supplement, ante.

³² California. See § 1192, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

Washington. Knowledge by the one posting the notice that it was immediately torn down renders notice ineffectual: Shaw v. Spencer, 57 Wash. 587, 107 Pac. Rep. 388.

CHAPTER XXV.

LIMITATIONS ON LIENS (CONTINUED). PRIORITIES.

§ 486. Scope of chapter.

§ 487. Priorities between mechanics' liens and other estates or interests, or other classes of liens.

§ 488. Same. Statutory statement of rule.¹§ 489. Same. General analysis of provision.
Additional matter to foot-note 12.²§ 490. Same. Grants and conveyances.
Additional matter to foot-note 15.³§ 491. Same. Doctrine of relation.
Additional matter to foot-note 18.⁴
Additional matter to foot-note 20.⁵

§ 492. Same. Lien for materials. Where the owner contracts directly with the claimant through himself or com-

¹ **California.** § 1186 Code Civ. Proc. was not amended by Act of May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

² **California.** Burnett v. Glas, 154 Cal. 249, 258, 97 Pac. Rep. 423; s. c., sub nom. Barrett-Hicks Co. v. Glas, 109 Cal. App. 491, 99 Pac. Rep. 856.

³ **California.** Holt Mfg. Co. v. Collins, 154 Cal. 265, 270, 97 Pac. Rep. 516.

Oregon. But see Coffey v. Smith, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

⁴ **Federal.** See Bankers T. Co. of New York v. T. A. Gillespie Co. (C. C. A.), 181 Fed. Rep. 448.

Kansas. See Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833.

Oregon. See Grants Pass B. & T. Co. v. Enterprise M. Co. (Oreg.), 113 Pac. Rep. 859.

⁵ **Kansas.** Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 835.

mon law agent, the priority of the lien is to be determined by the date when the claimant commenced to furnish the materials, and includes all materials that he may thereafter furnish for the building.⁶

Additional matter to foot-note 25.⁷

§ 493. Same. Contractors and subcontractors. Void contracts. Homestead.

Additional matter to foot-note 28.⁸

Additional matter to foot-note 29.⁹

§ 494. Same. Parts of day.

§ 495. Same. General rule.

Additional matter to foot-note 31.¹⁰

Additional matter to foot-note 32.¹¹

Additional matter to foot-note 33.¹²

Additional matter to foot-note 34.¹³

⁶ *California*. *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 270, 96 Pac. Rep. 788.

⁷ *California*. *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 270, 96 Pac. Rep. 788.

Kansas. See *Fossett v. Rock Island Land & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 835.

Oregon. *Grants Pass B. & T. Co. v. Enterprise M. Co. (Oreg.)*, 113 Pac. Rep. 859.

⁸ *California*. *Burnett v. Glas*, 154 Cal. 249, 258, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856.

Statutory original contract abolished by Stats. & Amdts. 1911, pp. 1313 et seq.

⁹ *California*. Compare *Blood v. Munn*, 155 Cal. 228, 100 Pac. Rep. 694.

¹⁰ *Alaska*. See *Copper River L. Co. v. Clark*, 3 Alaska 625.

California. See *Barrett-Hicks Co. v. Glas (Cal. App.)*, 111 Pac. Rep. 760, 766; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 258, 97 Pac. Rep. 423. Compare *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 269, 96 Pac. Rep. 788; and *Blood v. Munn*, 155 Cal. 228, 100 Pac. Rep. 694.

Oregon. *Grants Pass B. & T. Co. v. Enterprise M. Co. (Oreg.)*, 113 Pac. Rep. 859.

Washington. Compare *Biggs v. Hoffman (Wash.)*, 111 Pac. Rep. 576.

¹¹ *California*. *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 269, 270, 96 Pac. Rep. 788.

¹² *Washington*. Compare *Palmer v. Abrahams*, 55 Wash. 352, 104 Pac. Rep. 648.

¹³ *California*. *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 270, 97 Pac. Rep. 516.

Additional matter to foot-note 35.¹⁴

Additional matter to foot-note 36.¹⁵

Additional matter to foot-note 37.¹⁶

§ 495a. Same. Deed of trust. Work, general design.

The fact that claimant has been paid for work done prior to the execution and record of a deed of trust does not give priority to the deed of trust over the lien, for the work or material furnished after the record of the deed of trust, when the lien as whole relates back to the commencement of doing the work or furnishing the materials, and the construction or alteration is an entire undertaking, carried on in furtherance of one general design, although done in a somewhat fragmentary manner.¹⁷

§ 496. Same. Mortgage for purchase price.

§ 497. Same. Mortgage for future advances.

§ 498. Same. What constitutes further "advances."

§ 498a. Same. Prior and subsequent mortgages. Where all the liens are prior to a mortgage, or all are subsequent thereto, the case is different from that where part are prior and part subsequent. In the latter instance there must be a judgment and sale in such terms as to preserve the respective rights of the parties having liens upon the property; and the proceeds will be applied, first to the payment of the

¹⁴ **California.** Compare *Burnett v. Glas*, 154 Cal. 249, 258, 97 Pac. Rep. 423. See s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856.

¹⁵ **Arizona.** Compare *Bank of Arizona v. Thos. Haverly Co. (Ariz.)*, 115 Pac. Rep. 73, 75.

California. See *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 766; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; and compare s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 258, 97 Pac. Rep. 423.

New Mexico. *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 712, 713.

¹⁶ **New Mexico.** *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 712, 713.

¹⁷ **California.** *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 270.

prior liens, then to the payment of the mortgage, and then to the inferior liens.¹⁸

Debt not due. As a matter of necessity the debtor and mortgage creditor must under such circumstances be deemed to have acted subject to the contingency that such a disposition might become necessary, and the maturity of the debt brought forward, a rebate of interest being allowed, when proper.¹⁹ But when such necessity ceases to exist, for instance, when either the prior or subsequent liens are paid off, thus leaving only one class of liens surviving, the maturity of the mortgage debt can not be anticipated.²⁰

§ 499. **Same.** Reformation and alteration of instruments.

§ 500. **Same.** When lien claimants may attack prior encumbrances.

§ 501. **Same.** Garnishment by creditor.

§ 502. **Same.** Lien on two or more buildings. Statutory provision.

§ 503. **Same.** When provision as to two or more buildings applicable.

Additional matter to foot-note 54.²¹

¹⁸ **California.** *Burnett v. Glas*, 154 Cal. 249, 258, 97 Pac. Rep. 423; *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 766; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856.

Illinois. See *Croskey v. Northwestern Mfg. Co.*, 48 Ill. 481; *North Presbyterian Church v. Jevne*, 32 Ill. 214, 83 Am. Dec. 261; *Grundels v. Hartwell*, 90 Ill. 324.

North Dakota. See *Craig v. Herzman*, 9 No. Dak. 140, 81 N. W. Rep. 288.

Ohio. See *Choteau v. Thompson*, 2 Oh. St. 114.

Texas. *Kahler v. Carruthers*, 18 Tex. Civ. App. 216, 223, 45 S. W. Rep. 160.

¹⁹ **California.** *Burnett v. Glas*, 154 Cal. 249, 258, 97 Pac. Rep. 423. See s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 766.

²⁰ **California.** *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 766; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

²¹ **Kansas.** *Smith v. Chicago L. & C. Co.* (Kan.), 114 Pac. Rep. 372.

§ 504. Priority inter sese. Statutory provision.

Additional matter to foot-note 55.²²

§ 505. Same. Nature of provision.²³**§ 506. Same. Effect of constitution on statutory provision.**

Additional matter to foot-note 64.²⁴

§ 507. Same. Insufficient proceeds. Prorating. But under a void statutory original contract, that is, in case of a direct lien, no prorating or apportionment is necessary, so far as the amount that would otherwise be due under the original contract is concerned.²⁵

Additional matter to foot-note 67.²⁶

²² **California.** § 1194 Code Civ. Proc., was repealed by Act of May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

Marshalling assets:

Oregon. See *Washburn v. Inter-mountain M. Co.* (Oreg.), 109 Pac. Rep. 382, 386 (where mine and mill constitute one property to which lien attaches, doctrine of marshalling of assets can not be invoked; it applies only where there are two or more funds or properties).

Wyoming. See *Stowe v. Powers* (Wyo.), 116 Pac. Rep. 576.

²³ **California.** See § 1194 Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

²⁴ **California.** *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423. See *Hartwell v. Ganahl L. Co.*, 8 Cal. App. 733, 737, 97 Pac. Rep. 901.

See preceding note.

²⁵ **California.** *Coghlan v. Quartararo* (Cal. App.), 115 Pac. Rep. 664, 666.

The Statutory Original Contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

²⁶ **Marshalling assets:** See § 504, this Supplement, ante, notes.

CHAPTER XXVI.

OWNER, EMPLOYER, OR PERSON CAUSING IMPROVEMENT TO BE MADE.

§ 508. Owner and employer, or purchaser. Distinction.

Additional matter to foot-note 1.¹

Additional matter to foot-note 4.²

§ 509. Owner and reputed owner.³

§ 510. General rights of owner and employer. Scope of discussion.

§ 511. Same. Rights against contractor. Statutory provision.

Additional matter to foot-note 9.⁴

§ 512. Same. General rule as to non-payment of instalments.

¹ Various definitions of "owner":

California. See *Hughes Mfg. & L. Co. v. Wilcox* (Cal. App.), 108 Pac. Rep. 371 (ownership of stock); *Los Angeles Co. v. Winans* (Cal. App.), 109 Pac. Rep. 641 (under foreclosure of street assessment).

Kansas. See *Steele v. Dye*, 81 Kan. 286, 105 Pac. Rep. 700 (relating to taxation). See, also, *Hathaway v. Davis*, 32 Kan. 693, 5 Pac. Rep. 29.

Oklahoma. See *Jarrell v. Block*, 19 Okl. 467, 92 Pac. Rep. 167.

"Employer of Labor": See *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. Rep. 1027.

Public corporation as owner: See § 192, this Supplement, ante, and notes.

² **Idaho.** See *contra*, *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 792, 92 Pac. Rep. 980.

Kansas. See, *contra*, *Badger L. Co. v. Malone*, 8 Kan. App. 692, 54 Pac. Rep. 692.

³ See § 508, this Supplement, ante, note.

⁴ **California.** This provision remains under the amendment of 1911.

Kansas. Under similar provision, owner may contest the extent of the lien of subcontractor, even though contractor is satisfied with amount of his claim: *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103, Pac. Rep. 1003, 1004.

Oklahoma. This is upon the principle of subrogation: *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547, 548.

§ 513. Same. Right to cancel contract.

Additional matter to foot-note 11.⁵

§ 514. Same. Right of owner to retain fund. The owner has the right to retain the fund upon service of notice to withhold provided by the statute.⁶

Additional matter to foot-note 12.⁷

§ 515. Same. Offsets and counterclaims. Generally.

Additional matter to foot-note 19.⁸

⁵ **Washington.** *Mutual rescission:* See *Evans v. Oregon & W. R. Co.*, 58 Wash. 429, 108 Pac. Rep. 1095.

⁶ **California.** *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

⁷ **California.** *Right of owner to retain fund:* See *Klokke v. Raphael*, 8 Cal. App. 1, 5, 96 Pac. Rep. 392.

Kansas. *Right to retain fund:* See *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 836; *Wichita S. & D. Co. v. Well*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

Oklahoma. See *Jones v. Balsley (Okl.)*, 111 Pac. Rep. 942; *s. c.*, 25 Okl. 344, 106 Pac. Rep. 830.

⁸ **Colorado.** See *Gillett v. Young*, 45 Colo. 562, 101 Pac. Rep. 766, 768. **Idaho.** *For defective workmanship* in an action to foreclose lien of original contractor: *Steltz v. Armory Co.*, 15 Idaho, 551, 99 Pac. Rep. 98, 101.

Kansas. *Owner setting off damages against contractor:* See *Badger L. Co. v. Martin (Kan.)*, 112 Pac. Rep. 104, 105; *McCullough v. S. J. Hayde C. Co.*, 82 Kan. 734, 109 Pac. Rep. 176.

In *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 838, 839 (*Johnston, C. J.*, dissenting), it is said:

"In *Morehouse v. Moulding*, 74 Ill. 322, where the statute at the time provided that in no case should the owner be compelled to pay a greater sum than the price stipulated in the original contract, it was held that damages for the failure to fulfill a contract should be deducted from the contract price, and the balance prorated among the subcontractors [p. 839]. And in *Biggs v. Clapp*, 74 Ill. 335, the same clause of the Illinois statute is construed in a case where the contractor abandoned the contract and the owner was obliged to complete it himself. It was held that, where the owner was obliged to pay more than the contract price to complete the building, the subcontractors were not entitled to any lien. This court in *Hotel Co. v. Hardware Co.*, 56 Kan. 448, 43 Pac. Rep. 769, has laid down the same rule. It seems difficult to give a reason for allowing the owner credit for additional sums paid to carry out an abandoned contract, and thus reduce the fund upon which the subcontractor may rely, which would not apply with equal force to the allowance of damages occasioned by the fault of the contractor in other respects. The amount he contracted to pay was a certain sum, conditioned upon full performance of the contract according to its terms. *Wright v. Pohls*, 83 Wis. 560, 53 N. W. Rep. 848.

"Any damages resulting from the fault of either party, which could

be said to have been in the contemplation of the parties at the time the contract was made, should properly figure in the amount the owner contracted to pay. If such damages resulted in his favor, the amount he contracted to pay would be so much less than the amount named. Stating it in different language, he contracted to pay a certain sum conditioned upon the fulfillment of the contract, and, if any damages were caused by the contractor, he agreed to pay as much less as the damages amounted to.

"The owner may recoup damages against the contractor, arising out of the failure of the latter to perform faithfully the contract, and without regard to the absence in the contract of specific terms providing for damages. He may show as against the contractor that the building was not completed, or not completed in time, or that defective materials were used. Why should he not be permitted to show these counterclaims when it is sought to recover against him by one who has no contractual relations with him, and who seeks to recover a debt from the contractor? The only answer to this is that the statute fixes the extent of his liability to the subcontractor at the amount which he agreed to pay the contractor, regardless of whether the contract is fulfilled or not. Giving an offset for the cost of completing the building is, however, when analyzed, practically an allowance of damages for failure to complete. The measure of the damages is the ascertained cost of completion, but the principle is the same as though the contract provided for a certain sum as liquidated damages for each day's delay, and numerous decisions authorize the allowance of damages liquidated in this manner by the terms of the contract, even in suits to enforce a subcontractor's lien.

"With respect to this question also it may be observed that the authorities are not so numerous as might be expected upon a question so likely to arise in the adjustment of building liens, nor are many of them clear and decisive. Some of the text writers say that damages caused by the contractor may be offset against the lien of a subcontractor, but many of the cases referred to in the notes do not bear out the text. Thus Phillips on Mechanics' Liens, cites *Millsap v. Ball*, 30 Neb. 728, 46 N. W. Rep. 1125, relied upon by plaintiff in error. The case, however, is not an authority. There is in the opinion a statement that damages caused by a contractor may be offset against the lien of a subcontractor, but it appears on examination to be mere dictum. Some of the other cases cited by plaintiff in error were suits by the original contractor, and others are based upon statutes which expressly declare that the lien of the subcontractor is limited to 'what may be due the contractor,' leaving little room for doubt as to the proper construction.

"In some states, notably Michigan, the statute expressly provides that the owner may recoup damages sustained through the failure or omission of the contractor: *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. Rep. 1114, 80 N. W. Rep. 797.

"Damages caused by the fault of the contractor have been allowed against subcontractors in *McBean v. Kinnear*, 23 Ont. 313; *Julia v. Ristow Poths Mfg. Co.*, 54 Ill. App. 460; *Cheney v. Troy Hospital Assoc.*, 65 N. Y. 282.

"The authorities seem to be unanimous that, where the extent of the owner's obligation to pay is limited to the price stipulated in his contract, the subcontractor's right is confined to what may be due the contractor after the completion of the contract: Phillips on Mechanics' Liens, § 62g.

"In Massachusetts, the subcontractor is entitled to a direct lien, and there is no provision limiting the owner's liability to the amount

§ 516. **Same. Offsets and counterclaims against different payments.** The final payment required in the statutory original contract could not be paid by the owner to the prejudice of the valid lien claims, when the contract was not abandoned by the contractor.⁹

The owner has no right to recover damages when the contractor has the right to abandon the contract owing to the fault of the owner.¹⁰

In case of the abandonment of a valid statutory original contract, the final payment of twenty-five per cent was not applicable to subclaimants furnishing materials or performing labor before the abandonment, as their rights were fixed by the provisions of section twelve hundred of the Code of Civil Procedure of California.¹¹

Additional matter to foot-note 22.¹²

named in the contract. For that reason it is held in *Bowen v. Phinney*, 162 Mass. 593, 39 N. E. Rep. 283, 44 Am. St. Rep. 391, that a subcontractor was entitled to his lien notwithstanding the contractor violated the contract and used poor materials. The opinion recognized that in other states, where the owner's liability is limited to the amount of the contract price, a different rule obtains, and *Wright v. Pohls*, and *Morehouse v. Moulding*, *supra*, are referred to.

"The conclusion is that, giving a reasonable construction to our statute, it should be held that the owner may, in a suit by a subcontractor, offset any actual damages caused by the failure of the contractor to complete the building in time, provided, of course, the damages are such as may be said to have been in the contemplation of the parties when the contract was made."

Washington. Owner must look to original contractor for damages for improper materials and can not counterclaim such damages in suit to foreclose lien of subcontractor: *Rieflin v. Grafton* (Wash.), 115 Pac. Rep. 851, 853.

⁹ **California.** *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 233, 101 Pac. Rep. 691. See *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 90 Pac. Rep. 474, 475.

¹⁰ **California.** *Vulcan I. Works v. Cook* (Cal. App.), 114 Pac. Rep. 995.

¹¹ **California.** *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, 97 Pac. Rep. 152; *H. Raphael Co. v. Grote*, 154 Cal. 137, 97 Pac. Rep. 111; *Duffy L. Co. v. Stanton*, 9 Cal. App. 38, 98 Pac. Rep. 38.

§ 1200, Code Civ. Proc., was repealed by Stats. & Amdts. 1911, pp. 1313 et seq.

¹² **California.** See *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 475; *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 233, 101 Pac. Rep. 691. See preceding note.

Hampton v. Christensen, 148 Cal. 729, 84 Pac. Rep. 200, was not a case of abandonment, and the court made no reference to § 1200 Code Civ. Proc. The decision is not to be understood as holding that this section does not furnish ample and complete provision for cases falling within its terms. In such case, the balance computed according

§ 517. Same. Damage for delay in performance. Prevention of performance by independent contractor. The owner is not responsible to an original contractor for the acts of an independent contractor, especially where the contract itself contemplates that delays may be caused by the acts of such other contractors and that allowance therefor should be made to complete the work.¹³ Damages provided in the original contract for delay have no bearing on the measure of damages for abandonment and failure to complete the work altogether.¹⁴ Loss by delay caused by the owner or his agent can not be counterclaimed by the owner.¹⁵

Delays caused by other contractors. It is in the nature of building operations, when different classes of work are being done by various contractors that it will often happen that one contractor must wait until the work of another has been done; and it has been held that delays arising from such causes are not prevention or in any sense delay for which the owner is chargeable.¹⁶

to the method prescribed by the section of the statute mentioned, is all that the owner is required to devote to the discharge of such liens; in *Stimson M. Co. v. Nolan*, 5 Cal. App. 754, 91 Pac. Rep. 262, there was a void statutory original contract, and the claimants were entitled to liens for the full value of the labor performed and materials furnished: *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, 97 Pac. Rep. 152.

Colorado. Deductions for malperformance of details: *Ross M. & M. Co. v. Sethman* (Colo.), 114 Pac. Rep. 287.

Washington. Abandonment: See *Gordon v. Gillespie*, 58 Wash. 62, 109 Pac. Rep. 109, 110.

¹³ **California.** *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. Rep. 723.

¹⁴ **California.** *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892, 894.

¹⁵ **California.** *Boyd v. Bargagliotti*, 12 Cal. App. 228, 238, 107 Pac. Rep. 150; *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 233, 101 Pac. Rep. 691; *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 42, 106 Pac. Rep. 413.

Idaho. Damages for delay: *Steltz v. Armory Co.*, 15 Idaho 551, 99 Pac. Rep. 98, 101.

Kansas. Damages for delay in contemplation of parties: See *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 839. See this case in full, § 515, this Supplement, ante, note.

¹⁶ **California.** *Seebach v. Kuhn*, 9 Cal. App. 485, 490, 99 Pac. Rep. 723.

Oklahoma. Measure of damages for failure to deliver materials in time: *Standard L. Co. v. Miller & Vidor L. Co.*, 21 Okl. 617, 96 Pac. Rep. 761, 765.

Additional matter to foot-note 23.¹⁷

§ 518. Same. Completion of contract by owner. A provision in a building contract whereby the owner may take charge of and complete the building in case of failure of the contractor to proceed within a certain time, or upon his abandonment of the contract, is in favor of the owner, and he has the option to waive the same.¹⁸

§ 519. Same. Right to complete construction upon abandonment. Where the work of completion is done by the owner pursuant to the terms of the contract, upon abandonment by the contractor, the owner is liable only for the balance of the contract price that may remain over and above the cost of completion.¹⁹ In case of the abandonment of a valid statutory original contract, the rights of the sub-claimants who furnished materials and performed labor before the abandonment were fixed by the statute,²⁰ and the final payment of twenty-five per cent provided for in the contract was not applicable to the payment of their liens.²¹

Additional matter to foot-note 26.²²

Washington. Loss of rentals: See *Jones v. Nelson* (Wash.), 112 Pac. Rep. 88.

¹⁷ **California. No damages for delay when contractor has a right to abandon contract:** *Vulcan I. Works v. Cook* (Cal. App.), 114 Pac. Rep. 995.

¹⁸ **California.** *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616.

Colorado. *Gillett v. Young*, 45 Colo. 562, 101 Pac. Rep. 766, 768.

And having elected and recouped for the expenditures made, the owner can not be heard to say that the contractor abandoned the contract on his part: *Gillett v. Young*, *supra*.

¹⁹ **California.** *O'Brien v. Garibaldi* (Cal. App.), 115 Pac. Rep. 249, 252 (no lien claims and § 1200, Code Civ. Proc., was not under consideration): *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616.

Colorado. And the owner may also recover from the contractor any excess of the cost of completion over the contract price: *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 921.

²⁰ **California.** § 1200, Code Civ. Proc. (before repeal by Stats. & Amends. 1911, pp. 1313 et seq.).

²¹ **California.** *H. Raphael Co. v. Grote*, 154 Cal. 137, 97 Pac. Rep. 155; *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 97 Pac. Rep. 152.

²² **California.** Completion by owner after abandonment, completion under contract: See *O'Brien v. Garibaldi* (Cal. App.), 115 Pac. Rep. 249, 252.

§ 520. Same. Right to materials upon abandonment.

Before its repeal, section twelve hundred, relating to the liability of the owner upon contractor's abandonment, and others on the subject, related exclusively to the liens of mechanics, laborers and material-men and to the protection of the owner against lien claimants and the limitation of the owner's liability in his relation with the contractor and lien claimants. It did not purport nor attempt to define or interfere with the contractual relation between the contractor and his subcontractors until the subcontractor had brought himself within the provisions of the mechanics' lien law, by performing labor or by a sale and delivery to the contractor of the materials to be used in the building. Section twelve hundred referred to a case where the owner had made and filed a valid contract with the contractor who abandoned the building in an unfinished condition. The section contemplated its completion by the owner whose liability to lien claimants was limited by his contract with the contractor. The payments then (upon such abandonment) due, and actually paid, were to be deducted from the value of the work and materials already done and furnished, including materials actually delivered and on the ground, according to the terms of the contract and the provisions of sections eleven hundred and eighty-three and eleven hundred and eighty-four, and the remainder became applicable to the liens provided for in said last mentioned sections.

Materials actually delivered and on the ground were, for the purpose of this equitable adjustment, declared to "belong to the owner," but this declaration could not be held to mean materials which had never been sold to the contractor and had never been delivered to the contractor to be by him used in the construction of the building, but which in fact belonged to some other person.

Such a case is very different from the cases contemplated by and ordinarily arising under the mechanics' lien law,

Kansas. See *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 839; and see this case in full, § 515, this Supplement, ante, note.

where materials had been sold to the contractor, and actually delivered and on the ground. The seller parted with his property as in any other case of sale and delivery, and, but for the lien given to the seller, as a material-man, he would have had no recourse, except as against the contractor.

It had no application to the case of a subcontractor (as distinguished from a mere material-man) whose material had not been actually used by such subcontractor in the particular work in which he was employed, and which materials had not passed to the contractor or owner under the ordinary rules pertaining to the law of sales of goods.

The mere fact that the subcontractor charged the materials on its books to the contractor could not affect the question, when their contractual relation was clearly defined by a written subcontract and the evidence showed that the materials were delivered under such contract and it was not a contract for the sale of goods only.²³ Where the contractor abandoned his contract, the statute dealt only with the relation of lien claimants with the owner in respect of their rights as lien claimants and his liability to them as such. But it did not affect the contractual relations between the contractor and subcontractors who claimed no lien. The statute did not contemplate that the owner of the building might take property not belonging to the contractor.²⁴

²³ **California.** § 1200, Code Civ. Proc., was repealed by Stats. & Amdts. 1911, pp. 1313 et seq.

"The statute does not contemplate that the owner of the building may take property not belonging to the contractor. *Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. Rep. 635, and *McDonald v. Hayes*, 132 Cal. 490, 64 Pac. Rep. 850, were cases of foreclosure of liens where the parties brought themselves within the statute and proceeded under it." (In this present case, the owner was a municipal corporation, and no mechanic's lien could be enforced against the property, although proceedings against the fund in the nature of a garnishment was open to the subcontractor, and the materials had not yet actually been used.) *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 702, 703, 100 Pac. Rep. 714 (hearing in Supreme Court denied).

²⁴ **California.** *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 703, 704, 100 Pac. Rep. 714 (hearing in Supreme Court denied). See preceding note.

§ 520a. Same. Equitable rule and basis of liability to contractor. The rule is well established that in ordinary cases the contractor under a building contract may recover against the owner, notwithstanding that he has not strictly complied with his contract because of minor defects and imperfections, and even omissions, not willful or fraudulent. This rule is sometimes spoken of as the modern equitable doctrine of substantial performance.

It rests for its justification upon the proposition that in such cases the owner has either accepted the benefit of the work of the contractor or, because of the nature of the transaction, he perforce receives such benefit to his property, and may be protected from any actual pecuniary loss by a recoupment in damages for deficiencies and imperfections. Oftentimes minor defects and imperfections occur in the construction or repair of buildings without intentional fault of the contractor. For such defects the owner may be readily made whole by an allowance of damages. So, too, under the mechanics' lien law it is provided that, for the purpose of filing liens, a building shall not be held uncompleted because of trivial imperfections.²⁵

§ 521. Same. Rights against others.

Subsequent judgment in favor of the owner against the estate of the original contractor can not affect the liability of the owner upon garnishment by way of execution levied upon him prior to the death of the contractor, at the instance of the contractor's subclaimants, for the indebtedness due from the owner to the contractor.²⁶

Additional matter to foot-note 28.²⁷

²⁵ Seebach v. Kuhn, 9 Cal. App. 485, 99 Pac. Rep. 723 (hearing in Supreme Court denied), citing Perry v. Quackenbush, 105 Cal. 299, 38 Pac. Rep. 740; Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. Rep. 626; Bianchi v. Hughes, 124 Cal. 25, 56 Pac. Rep. 610; Marchant v. Hayes, 117 Cal. 670, 49 Pac. Rep. 840; Santa Monica L. Co. v. Hege, 119 Cal. 376, 51 Pac. Rep. 555.

²⁶ California. Nordstrom v. Corona City W. Co., 155 Cal. 206, 214, 100 Pac. Rep. 242.

²⁷ California. Damages for failure to deliver materials: See Fairchild-Gilmore-Wilton Co. v. Southern R. Co. (Cal. Sup.), 110 Pac. Rep. 951.

Kansas. As to recoupment for damages against subcontractors: See Wichita S. & D. Co. v. Well, 80 Kan. 606, 103 Pac. Rep. 1003, 1004;

§ 522. Same. Payments. Where the owner is not obliged to make the payment demanded by the contractor, the latter is not justified in stopping work upon the refusal of the owner to make the payment or meet the expense; thus where land slides from adjoining property and injures the building, the owner is not obliged to pay the expense of restoring the building to the condition in which it was before the slide; and the contractor may not legally refuse to go on with the work for this reason alone.²⁸

Additional matter to foot-note 30.²⁹

Additional matter to foot-note 31.³⁰

Additional matter to foot-note 32.³¹

§ 523. General obligations of owner and employer. Scope of discussion.

Additional matter to foot-note 34.³²

§ 524. Same. Duty to file statutory original contract.

Additional matter to foot-note 36.³³

Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 14 L. R. A. (N. S.), 918.

Oregon. As to absence of right of lateral support with increased weight of building: See **Weiss v. Kohlhagen** (Oreg.), 113 Pac. Rep. 46.

²⁸ **California.** **Carlson v. Sheehan**, 157 Cal. 692, 697, 109 Pac. Rep. 29.

²⁹ **Oregon.** See **Bohn v. Wilson**, 53 Oreg. 490, 101 Pac. Rep. 202, 204.

Washington. **Premature payment:** See **Monro v. National S. Co.**, 47 Wash. 488, 92 Pac. Rep. 280.

Application of payment by owner:

Oregon. See **Bohn v. Wilson**, 53 Oreg. 490, 101 Pac. Rep. 202, 204.

Washington. See **Bowles v. Fraser** (Wash.), 109 Pac. Rep. 812; **Hughes & Co. v. Flint** (Wash.), 112 Pac. Rep. 633.

³⁰ **Kansas.** But see **Fossett v. Rock Island L. & Mfg. Co.**, 76 Kan. 428, 92 Pac. Rep. 833.

³¹ **Oregon.** **Application of payment by contractor to material-man:** See **Eugene P. M. Co. v. Soule** (Oreg.), 106 Pac. Rep. 21.

³² **California.** **Obligation of owner to remove earth which falls from adjoining property by natural causes:** See **Carlson v. Sheehan**, 157 Cal. 692, 697, 109 Pac. Rep. 29.

³³ **California.** Compare **Lucas v. Gobbi**, 10 Cal. App. 648, 653, 103 Pac. Rep. 157.

The Statutory Original Contract was abolished by Stats. & Amdts. 1911, pp. 1313 et seq., but the duty to file the original contract is still upon the owner, to limit his liability.

§ 525. Same. Duty to withhold payments.

Additional matter to foot-note 37.³⁴

Additional matter to foot-note 38.³⁵

§ 526. Same. Liability of owner to breach or abandonment. Statutory provision.³⁶

§ 527. Same. Application of statutory provision.³⁷

Where the valid statutory original contract was abandoned by the original contractor, before the amendment of 1911, under the rule of the statute, when the value of the work and materials already done and furnished at the time of the abandonment, including materials then actually delivered or on the ground, estimated as near as might be by the standard of the whole contract price, was less than the payments then due and actually paid, there was nothing to feed the liens of the contractor's subclaimants.³⁸ In such cases the statutory method of ascertaining the liability of the owner's property was exclusive, both as to the contractor and as to his subclaimants.³⁹

But where the owner elected to proceed under the provisions of the valid statutory original contract, after default of the contractor and notice to him of his intention to complete the structure, under permission given in the contract, the contractor was entitled to the difference between

³⁴ *California*. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

³⁵ *Oklahoma*. See *Jones v. Balsley (Okla.)*, 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

³⁶ *California*. § 1200, Code Civ. Proc., was repealed by Stats. & Amdts. 1911, pp. 1313 et seq.

³⁷ *California*. See preceding note.

³⁸ *California*. *McCue v. Jackman*, 7 Cal. App. 703, 704, 95 Pac. Rep. 673; *Duffy L. Co. v. Stanton*, 9 Cal. App. 38, 98 Pac. Rep. 38; *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 115, 97 Pac. Rep. 152; *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 141, 97 Pac. Rep. 155; *H. Raphael Co. v. Grote*, 154 Cal. 137, 97 Pac. Rep. 155.

See note 36, this chapter, ante.

³⁹ *California*. *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 141, 97 Pac. Rep. 155. See note 36, this chapter, ante.

the cost of completion and the amount otherwise due under the contract.⁴⁰

Additional matter to foot-note 42.⁴¹

Additional matter to foot-note 48.⁴²

§ 528. Same. Void contract abandoned.

Additional matter to foot-note 51.⁴³

§ 529. Same. Non-statutory original contract.

Additional matter to foot-note 53.⁴⁴

§ 530. Same. Destruction of building. Upon destruction of a building in process of erection, without fault of either party, under a contract providing for the losses that should be borne by the respective parties, there is no implied covenant on the part of the owner that the building or work shall continue in existence, and the owner is not liable, under the terms of the contract, if there is nothing due under the contract to the contractor at the time of the de-

⁴⁰ *California*. *Dahlberg v. Girsch*, 157 Cal. 324, 330, 107 Pac. Rep. 616; *O'Brien v. Garibaldi* (Cal. App.), 115 Pac. Rep. 249, 252.

See § 526, this Supplement, ante, note.

⁴¹ *California*. See, generally, *Steiger T. C. & P. Works v. City of Sonoma*, 9 Cal. App. 698, 703, 704, 100 Pac. Rep. 714; and see §§ 520 and 526, this Supplement, ante, and notes.

Colorado. Upon abandonment and completion by owner under the contract, the lien of subclaimants extends to the difference between the amount paid at the time of abandonment and the contract price, less the cost of completing the contract: *Rice v. Rhone* (Colo.), 111 Pac. Rep. 585, 587.

Utah. See *Foulger v. McGrath*, 34 Utah, 86, 95 Pac. Rep. 1004, 1006, 1007.

Washington. Measure of damages is the difference between the contract price and the actual cost of completing the work; and the liability of the contractor arises as soon as the contract is breached by abandonment: *Gordon v. Gillespie*, 58 Wash. 62, 109 Pac. Rep. 109, 110.

See §§ 284 et seq., this Supplement, ante.

⁴² *California*. See *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 115, 97 Pac. Rep. 152.

⁴³ *California*. Abandonment of void contract: See *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, 97 Pac. Rep. 152; *Stimson M. Co. v. Nolan*, 5 Cal. App. 754; 91 Pac. Rep. 262.

See §§ 258, 269, 274, 281, 288, 328, and 526, this Supplement, ante.

⁴⁴ See Effect of Validity of Contract, §§ 315 et seq., this Supplement, ante.

struction.⁴⁵ And, on the other hand, it seems that there is no implied agreement, under such circumstances, that the contractor shall rebuild after such destruction.⁴⁶

And the rule regarding acceptance of benefits of the work by the owner, under the circumstances stated, does not come into operation, and subclaimants can not foreclose a lien.⁴⁷ But where a structure is destroyed before completion, for instance, where a bridge is carried away by floods, the failure of the owner to derive benefits is no defense in an action for the reasonable value of the work done, if the damage was caused by fault of the owner, as where he failed to supply the materials as stipulated.⁴⁸

§ 531. Same. Liability of fee for improvements, by trespasser.

Additional matter to foot-note 55.⁴⁹

§ 532. Same. Application of payments by subclaimants. When the owner makes a general settlement with the contractor by check which is endorsed by the contractor to his material-man, there being no application by the owner to any particular building, the subclaimant may properly apply it to one or more of the owner's buildings, for which he furnished materials.⁵⁰

Additional matter to foot-note 56.⁵¹

⁴⁵ California. *Watson v. Alta I. Co.*, 12 Cal. App. 560, 565, 108 Pac. Rep. 48; *Watson v. Alta I. Co.*, 12 Cal. App. 566, 108 Pac. Rep. 50.

⁴⁶ California. *Hettinger v. Thiele* (Cal. App.), 113 Pac. Rep. 121.

⁴⁷ California. *Watson v. Alta I. Co.*, 12 Cal. App. 560, 565, 108 Pac. Rep. 48; *Watson v. Alta I. Co.*, 12 Cal. App. 566, 108 Pac. Rep. 50.

⁴⁸ California. *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237, 107 Pac. Rep. 150.

⁴⁹ Oregon. Claimant must connect himself with the owner of the property: *Equitable S. & L. Assoc. v. Hewitt* (Oreg.), 106 Pac. Rep. 447, 450; *Washburn v. Intermountain M. Co.* (Oreg.), 109 Pac. Rep. 383, 385; *Crane Co. v. Erle H. Co.* (Oreg.), 112 Pac. Rep. 430.

⁵⁰ California. *San Pedro L. Co. v. Schroeter*, 156 Cal. 158, 161, 103 Pac. Rep. 888, distinguishing *Goss v. Strellitz*, 54 Cal. 640, in which there appears to have been an attempt to apply the payment to another and distinct indebtedness in which the owner was in nowise involved.

⁵¹ California. Proper application by subclaimant of check given to contractor by owner on general account, without application: *San Pedro L. Co. v. Schroeter*, 156 Cal. 158, 161, 103 Pac. Rep. 888.

Additional matter to foot-note 58.⁵²

§ 533. Same. Payment of orders of contractor. Splitting demands.

§ 534. Same. Orders on owner's mortgages. Destruction of building.⁵³

§ 535. Same. Voluntary payment of contractor's debts. The owner has no means of ascertaining whether the claims of subclaimants are just or unjust. He can not, except at his peril, voluntarily pay them, and in the absence of any action on the part of the contractor, the owner is entitled to have the rights of the claimants established by decree of court.⁵⁴

Additional matter to foot-note 61.⁵⁵

§ 536. Same. Guaranty not a prohibited payment.

§ 537. Same. Owner as stakeholder. Additional matter to foot-note 66.⁵⁶

Montana. The burden of proof as to application of payment to extras is on claimant and not upon owner: *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 672.

If the contractor credits the payment on owner's building, subclaimant can not credit or apply it to other buildings: *Mills v. Olsen* (Mont.), 115 Pac. Rep. 33, 36.

Oregon. Application of payment by contractor on paying his material-man: See *Eugene P. M. Co. v. Snell* (Oreg.), 106 Pac. Rep. 21.

⁵² **California.** See *O'Brien v. Garibaldi* (Cal. App.), 115 Pac. Rep. 249.

⁵³ See § 530, this Supplement, ante.

⁵⁴ **California.** *Klokke v. Raphael*, 8 Cal. App. 1, 5, 96 Pac. Rep. 392.

⁵⁵ **Kansas.** Right of owner to retain fund: *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004; *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 836.

Oklahoma. Owner pays at his peril prior to time fixed by statute: *Albert v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 546; *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830 (and owner may withhold same until such time).

⁵⁶ **California.** As to lack of owner's right to withdraw general deposit: See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 523, 97 Pac. Rep. 414, 420. See *Higgins v. Keyes*, 5 Cal. App. 482, 90 Pac. Rep. 972.

New York practice as to deposit adopted; substitute of fund for land: *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

§ 538. Same. Liability for costs and interest. Interpleader.

Additional matter to foot-note 68.⁵⁷

Additional matter to foot-note 70.⁵⁸

Additional matter to foot-note 72.⁵⁹

§ 539. Same. Personal liability.

Additional matter to foot-note 73.⁶⁰

See *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674; *Dunning v. Clark*, 2 E. D. Smith 535; *People v. Butler*, 61 How. Pr. 274; *Raven v. Smith*, 76 Hun. 60, 27 N. Y. Supp. 611; *In re Dean*, 83 Hun. 413, 31 N. Y. Supp. 959; *Schillinger, etc., Co. v. Arnott*, 86 Hun. 182, 33 N. Y. Supp. 343, affirmed, 152 N. Y. 584, 46 N. E. Rep. 956.

Kansas. The statute of this state makes no provision for deposit, and same does not affect lien on land: *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

⁵⁷ **California.** Action by owner to compel claimants to litigate their claims: See *Hartwell v. Ganahl L. Co.*, 8 Cal. App. 733, 97 Pac. Rep. 901.

Interest:

California. See *Burnett v. Glas*, 154 Cal. 249, 260, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856.

Washington. See *Jones v. Nelson (Wash.)*, 112 Pac. Rep. 88.

See, generally, § 907, this Supplement, post.

⁵⁸ **Deposit in court:**

California. See *Klokke v. Raphael*, 8 Cal. App. 1, 5, 96 Pac. Rep. 392; *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 522, 97 Pac. Rep. 414, 420; *Higgins v. Keyes*, 5 Cal. App. 482, 90 Pac. Rep. 972; *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

Kansas. See *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

See, also, § 537, this Supplement, ante, notes; and § 871, this Supplement, post.

⁵⁹ **Washington.** But if owner tenders amount he should not be penalized by costs and attorney's fees: *Hughes & Co. v. Flint (Wash.)*, 112 Pac. Rep. 633, 635.

⁶⁰ **California.** *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266, 274, 96 Pac. Rep. 788; *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 521, 97 Pac. Rep. 414, 420; *Nordstrom v. Corona City W. Co.*, 155 Cal. 206, 100 Pac. Rep. 242.

Idaho. *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Kansas. *Chicago L. & C. Co. v. Washington*, 80 Kan. 613, 103 Pac. Rep. 80, 81; *Robert Garrett L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 180, 181; *Sutherlin v. Chesney (Kan. Sup.)*, 116 Pac. Rep. 254.

See *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

Montana. *Logan v. Billings & N. R. Co.*, 40 Mont. 467, 107 Pac. Rep. 415; *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

Oklahoma. See *Bloch v. Pearson*, 19 Okl. 422, 91 Pac. Rep. 714; *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 547.

Additional matter to foot-note 74.⁶¹

Additional matter to foot-note 76.⁶²

Additional matter to foot-note 77.⁶³

Additional matter to foot-note 82.⁶⁴

§ 540. Same. Liability of owner or employer under valid contract.

Additional matter to foot-note 83.⁶⁵

Additional matter to foot-note 85.⁶⁶

Additional matter to foot-note 88.⁶⁷

Washington. Liability of owner for negligence of contractor: See Cary v. Sparkman & McLean (Wash.), 113 Pac. Rep. 1093.

Washington. See Bellingham v. Linck, 53 Wash. 208, 101 Pac. Rep. 843, 844.

Utah. Volker-Scowcroft L. Co. v. Vance (Utah), 103 Pac. Rep. 970; s. c., 32 Utah 74, 88 Pac. Rep. 896.

⁶¹ **California.** Hubbard v. Lee, 6 Cal. App. 602, 606, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

Kansas. Wichita S. & D. Co. v. Well, 80 Kan. 606, 103 Pac. Rep. 1003, 1004; Fossett v. Rock Island L. Co., 76 Kan. 428, 92 Pac. Rep. 833, 14 L. R. A. (N. S.) 918.

Oregon. Claimant must connect himself with the owner: Equitable S. & L. Assoc. v. Hewitt (Oreg.), 106 Pac. Rep. 447, 450; Crane Co. v. Erie H. Co. (Oreg.), 112 Pac. Rep. 430.

⁶² **Arizona.** Harper v. Independence D. Co. (Ariz.), 108 Pac. Rep. 701. **California.** Merced L. Co. v. Bruschi, 152 Cal. 372, 375, 92 Pac. Rep. 844.

Idaho. Larson v. Carter, 14 Idaho 511, 94 Pac. Rep. 825, 827.

Oklahoma. Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 546.

Washington. See Shaw v. Spencer, 57 Wash. 587, 107 Pac. Rep. 383.

⁶³ **California.** Hubbard v. Lee, 6 Cal. App. 602, 606, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528; Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 524, 526, 97 Pac. Rep. 414, 420; Smith v. Dryden (Cal. App.), 115 Pac. Rep. 455.

⁶⁴ See §§ 572, et seq., this Supplement, post.

Washington. Erickson v. Hochbrune, 47 Wash. 33, 91 Pac. Rep. 485.

⁶⁵ See, generally, §§ 315, et seq., §§ 452, et seq., §§ 469, et seq., this Supplement, ante.

⁶⁶ **California.** Hoffman-Marks Co. v. Spires, 154 Cal. 111, 116, 97 Pac. Rep. 152.

Kansas. Wichita S. & D. Co. v. Well, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

⁶⁷ **California.** Stockton L. Co. v. Schuler, 155 Cal. 411, 412, 101 Pac. Rep. 307; D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 92, 101 Pac. Rep. 38.

Idaho. Sanders v. Keller (Idaho), 111 Pac. Rep. 350.

Kansas. Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 836.

Washington. Hughes & Co. v. Flint (Wash.), 112 Pac. Rep. 633, 635.

Additional matter to foot-note 91.⁶⁸

§ 541. Same. Payment to subclaimants. Valid contract. Last payment.

Additional matter to foot-note 92.⁶⁹

§ 542. Same. Liability of owner under void contract. Under a void statutory original contract, subclaimants had a direct lien, independent of the contract price.⁷⁰

Additional matter to foot-note 93.⁷¹

Additional matter to foot-note 95.⁷²

§ 543. Void contract. Penal provision.⁷³

Additional matter to foot-note 98.⁷⁴

§ 544. Same. Statute measure of liability under void contract.

Additional matter to foot-note 99.⁷⁵

⁶⁸ *California*. See *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

⁶⁹ *California*. See *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307. See, also, *Merced L. Co. v. Bruschi*, 152 Cal. 372, 374, 92 Pac. Rep. 844 (void contract—liability for any balance of amount claimed and lien established above amount distributed by owner among claimants).

⁷⁰ *California*. *Merced L. Co. v. Bruschi*, 152 Cal. 372, 374, 92 Pac. Rep. 844.

The Statutory Original Contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

⁷¹ See § 541, this Supplement, ante.

⁷² *California*. See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 524, 526, 97 Pac. Rep. 414, 420.

⁷³ *California*. The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

⁷⁴ *California*. See *Hubbard v. Lee*, 6 Cal. App. 602, 606, 92 Pac. Rep. 744; *s. c.*, 10 Cal. App. 477, 102 Pac. Rep. 528; *D. I. Nofziger L. Co. v. Waters*, 10 Cal. App. 89, 92, 101 Pac. Rep. 38.

⁷⁵ *California*. See *Smith v. Dryden* (Cal. App.), 115 Pac. Rep. 455; *D. I. Nofziger L. Co. v. Waters*, 10 Cal. App. 89, 92, 101 Pac. Rep. 38; *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537; *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep.

§ 545. Same. Personal liability to subclaimants under void contract.

Additional matter to foot-note 102.⁷⁶

§ 546. Same. False representations by owner as to completion of building.

474, 476; *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 94 Pac. Rep. 773.

See note 73, § 543, this Supplement, ante.

⁷⁶ *California*. *Hubbard v. Lee*, 6 Cal. App. 602, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528; *Smith v. Dryden* (Cal. App.), 115 Pac. Rep. 455; *San Pedro L. Co. v. Schroeter*, 156 Cal. 158, 161, 103 Pac. Rep. 888. See *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 483, 94 Pac. Rep. 773.

See note 73, § 543, this Supplement, ante.

CHAPTER XXVII.

OWNER, EMPLOYER, OR PERSON CAUSING IMPROVEMENT
TO BE MADE (CONTINUED). LIABILITY AS
FIXED BY NOTICE.

§ 547. Scope of discussion.

Additional matter to foot-note 2.¹§ 548. Notice to owner or employer. History.²§ 549. Statutory provision.³Additional matter to foot-note 13.⁴

§ 550. Notice to owner, and claim of lien. Distinction and purposes. The statutes of the different jurisdictions require various notices, the giving of which, or the failure to give which, has effect to be determined and measured by the construction given to the respective statutes. In some states, the giving of certain notices is essential to the validity of the lien, while other notices under the same statute affect merely the measure of recovery, or the extent of the lien on the fund or indebtedness due from the owner.⁵

¹ As to Notice of non-responsibility and knowledge of improvement, see, generally, §§ 473 et seq., this Supplement, ante, and notes. As to Notice, generally, see § 475, this Supplement, ante, and notes.

² California. See § 1184 Code Civ. Proc., as amended May 1, 1911 (Stats. and Amdts. 1911, pp. 1313, et seq.). Notice must now be served upon demand of owner.

³ See preceding note.

⁴ California. See *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

⁵ Kansas. See *Home L. & S. Co. v. School Dist. (Kan.)*, 115 Pac. Rep. 590; *Deatherage v. Henderson*, 43 Kan. 684, 690, 23 Pac. Rep. 1052, 1054; *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 837, 838 (calling attention to the difference between the California statute and the Kansas statute).

Oklahoma. As to various notices prescribed by statute, see *Jones v. Balsley (Okla.)*, 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

Washington. Delivery or mailing of duplicate statement to owner, under § 1, Laws 1909, c. 45, pp. 71, 72, held essential to lien, whether

Additional matter to foot-note 18.⁶

§ 551. Notice to owner creating personal obligation.

Where the statutory notice to withhold is given to the owner, it is his duty as well as right, or that of the person representing him, in making payment to the contractor to withhold from the contractor "sufficient money due or that may become due to such contractor or other person to answer such claim."⁷

Additional matter to foot-note 24.⁸

§ 552. Notice to owner. Garnishment.

Additional matter to foot-note 26.⁹

Additional matter to foot-note 30.¹⁰

Additional matter to foot-note 32.¹¹

§ 553. Provision, when applicable. The notice to withhold provided for by the statute¹² need not be served upon the contractor, when the statute does not require the same;

owner has actual notice of claim or not: *Finley v. Tagholm* (Wash.), 113 Pac. Rep. 1083, 111 Pac. Rep. 782; *Spokane G. & T. Co. v. Lyttaker* (Wash.), 109 Pac. Rep. 316.

But such delivery or mailing is not required in the case of the owner's claimant: *Rieslin v. Grafton* (Wash.), 115 Pac. Rep. 851, 853; *Finley v. Tagholm*, *supra*.

The purpose of this notice is not so much to insure the right of lien as to protect the property of the owner against dishonest contractors: *Spokane G. & T. Co. v. Lyttaker* (Wash.), 109 Pac. Rep. 316, distinguishing *Strandell v. Moran*, 49 Wash. 533, 95 Pac. Rep. 1106 and *Cascade L. Co. v. Aetna I. Co.*, 56 Wash. 503, 106 Pac. Rep. 158.

⁶ *California*. See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

⁷ *California*. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

⁸ *California*. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 510, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

⁹ *California*. As to ordinary garnishment against public body at instance of claimant: See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 510, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

¹⁰ *California*. *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

¹¹ *California*. See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 510, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

¹² *California*. § 1184 Code Civ. Proc., as it stood before the amendment of 1911 (Stats. and Amdts. 1911, pp. 1313 et seq.).

and the original contractor, it has been said is the only person named in section eleven hundred and eighty-three of the Code of Civil Procedure, who can not avail himself of the provisions of the statute with regard to the notice to withhold.¹³

§ 554. General rights upon service of notice.

Additional matter to foot-note 42.¹⁴

§ 555. Same. Early statutes.

§ 556. Same. Under valid contract, generally.¹⁵

§ 557. Same. Claim of lien as equivalent of notice to owner.¹⁶

§ 558. Same. Valid statutory original contract.

Additional matter to foot-note 51.¹⁷

Additional matter to foot-note 52.¹⁸

§ 559. Same. Void statutory original contract.¹⁹

§ 560. Same. Non-statutory original contract.²⁰

¹³ California. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 462, 94 Pac. Rep. 775.

¹⁴ California. See Goldtree v. City of San Diego, 8 Cal. App. 505, 512, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

¹⁵ California. The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

¹⁶ California. But see § 1184 Code Civ. Proc., as amended May 1, 1911 (Stats. and Amdts. 1911, pp. 1313, et seq.), under which owner may demand that notice be served upon him and lien will be lost by failure to comply.

¹⁷ California. Hubbard v. Lee, 6 Cal. App. 602, 605, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

¹⁸ California. Hubbard v. Lee, 6 Cal. App. 602, 605, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

¹⁹ California. The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

²⁰ See preceding note.

§ 561. Same. Effect of notice on payments already made or assigned. Where the owner is served by the sub-contractor's material-man with the proper statutory notice to withhold payments for materials furnished to such subcontractor, the fact that the contractor was not notified of such claim and on the day prior to the notice to the owner such contractor paid to the subcontractor all that was due to him does not affect the lien on the fund by garnishment or the lien on the property of the owner, if there were moneys in the hands of the owner due to the contractor under the terms of the contract at the time of the service of the notice to withhold.²¹

Additional matter to foot-note 64.²²

§ 562. Same. Payment by note.²³

§ 563. Same. Relation to provision as to premature payments.

Additional matter to foot-note 71.²⁴

§ 564. Same. Service of notice on public trustees. The mechanics' lien law of the California code is the statutory provision made by the legislature in obedience to the constitutional mandate of section fifteen, and prescribes the manner in which the right to the lien in each particular case may be declared and rendered effective. Two methods are provided for giving notice of claim of lien; one by recording against the property (section eleven hundred and eighty-three), and the other by notice to the holder of the fund which has been earned by the claimant's labor (section eleven hundred and eighty-four). The former, for reasons of public policy, can not be enforced against a public building or improvement, but no such objection exists

²¹ *California. Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 94 Pac. Rep. 775.

²² *Colorado. Rights of assignee of claim against owner: See Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 919.

Washington. See Strandell v. Moran, 49 Wash. 533, 95 Pac. Rep. 1106.

²³ See § 32, this Supplement, ante.

²⁴ *Architect's certificate: See §§ 239 et seq.*, this Supplement, ante.

as to the latter. It has sometimes been claimed that both of these methods were intended by the legislature to apply only to private owners. To so construe the enactment would be to hold that the legislature has failed to carry out the command to provide means to render effectual the right created by the constitution; that it has only partially complied with the requirement of the section. The Bond Act of 1897 (Stats. 1897, p. 201), does not recognize a lien or provide for the speedy and efficient enforcement of one. As a means of securing the payment of the claims of laborers employed upon public work it is merely cumulative and does not exclude or do away with the constitutional lien. Section eleven hundred and eighty-four furnishes the only available method by which the laborer can obtain the benefit of his lien upon public work. It is apparently upon this principle that the decisions in *Bates v. Santa Barbara*,²⁵ and the cases relying thereon, were decided.²⁶

In an action founded upon the statutory notice to withhold payments, at the instance of subclaimants, given to a municipality, the latter's only interest in the litigation is that of a stakeholder, and no costs of the litigation can be imposed upon it.²⁷

Additional matter to foot-note 72.²⁸

²⁵ *Bates v. County of Santa Barbara*, 90 Cal. 543, 27 Pac. Rep. 438.

²⁶ *California*. *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

²⁷ *California*. *Goldtree v. City of San Diego*, 8 Cal. App. 505, 511, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218 (distinguishing between the scope of powers of a school district and those of a city; and holding that *Bates v. County of Santa Barbara*, 90 Cal. 543, 27 Pac. Rep. 438, in so far as there is any inconsistency between it and *Skelly v. School Dist.*, 103 Cal. 659, 37 Pac. Rep. 643, is more in accord with the spirit and intention of the constitutional provision and the more recent declarations of the Supreme Court).

²⁸ *California*. See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Idaho. State may be liable upon contract to withhold moneys from contractor for materials furnished for public contract; although no execution can issue against the state: *Rathbun v. State*, 15 Idaho 273, 97 Pac. Rep. 335, 337.

Additional matter to foot-note 74.²⁹

Additional matter to foot-note 78.³⁰

§ 565. Time of giving notice.

Additional matter to foot-note 79.³¹

Additional matter to foot-note 81.³²

§ 566. Joint contractors. Apportionment.

§ 567. Action on notice.³³

§ 568. Form and contents of notice. Construction.

Additional matter to foot-note 85.³⁴

§ 569. Same. Effect of several notices served.

As to lien against state or federal property: See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 791, 92 Pac. Rep. 980.

²⁹ **Colorado.** Public authorities may properly require contractor on public works to stipulate to pay labor and material bills: *State Board of Agriculture v. Dimick*, 46 Colo. 609, 105 Pac. Rep. 1114. See *City and County of Denver v. Hindry*, 40 Colo. 42, 90 Pac. Rep. 1028, 11 L. R. A. (N. S.), 1028; *International Trust Co. v. Keefe Mfg. & I. Co.*, 40 Colo. 440, 91 Pac. Rep. 915.

³⁰ **Washington.** Duplicate statement required by Laws 1909, c. 45, § 1, is not applicable with regard to bond and contract for public work, under Laws 1909, c. 207: *Gate City L. Co. v. City of Montesano* (Wash.), 111 Pac. Rep. 799.

See, also, as to latter statute: *Cascade L. Co. v. Aetna I. Co.*, 56 Wash. 503, 106 Pac. Rep. 158; *Minneapolis S. & M. Co. v. Aetna I. Co.*, 56 Wash. 699, 106 Pac. Rep. 160; *Strandell v. Moran*, 49 Wash. 533, 95 Pac. Rep. 1106.

³¹ **California.** See *Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co.*, 7 Cal. App. 460, 94 Pac. Rep. 775.

³² **Reasonable time for giving notice:**

Kansas. See *Home L. & S. Co. v. School Dist.* (Kan.), 115 Pac. Rep. 590.

Washington. See *Spokane G. & T. Co. v. Lyttaker* (Wash.), 109 Pac. Rep. 316. See *Finley v. Tagholm* (Wash.), 111 Pac. Rep. 782; *Strandell v. Moran*, 49 Wash. 533, 95 Pac. Rep. 1106; *Cascade L. Co. v. Aetna I. Co.*, 56 Wash. 503, 106 Pac. Rep. 158.

³³ **California.** See § 1184 Code Civ. Proc., as amended May 1, 1911 (Stats. and Amdts. 1911, pp. 1313 et seq.).

³⁴ **Washington.** See *Strandell v. Moran*, 49 Wash. 533, 95 Pac. Rep. 1106.

§ 570. **Same. Statutory requirements of notice.**
Additional matter to foot-note 92.³⁵

§ 571. **Same. Sufficiency of notice.**³⁶

³⁵ **Washington. Signature:** See *Strandell v. Moran*, 49 Wash. 533, 95 Pac. Rep. 1106.

³⁶ Compare "Claim," §§ 375 et seq., this Supplement, ante.

CHAPTER XXVIII.

AGENCY.

§ 572. **General principles. Actual and ostensible agency.**
Contracting architect, upon a percentage basis, owner paying all bills, is the common law agent of the owner.¹

Additional matter to foot-note 3.²

Additional matter to foot-note 4.³

§ 573. **Agency by statutory estoppel.**⁴

§ 574. **Same. Purpose.**

Additional matter to foot-note 7.⁵

¹ **California.** Loma Prieta L. Co. v. Hinton, 12 Cal. App. 766, 768, 108 Pac. Rep. 528.

Agency between husband and wife; see following cases:

Federal. Healey I. M. Co. v. Green (C. C., N. C.), 181 Fed. Rep. 890.

Idaho. Larson v. Carter, 14 Idaho 511, 94 Pac. Rep. 825, 827.

Kansas. Chicago L. & C. Co. v. Washington, 80 Kan. 613, 108 Pac. Rep. 80, 81; Robert Garrett L. Co. v. Loftus, 82 Kan. 556, 109 Pac. Rep. 179, 180, 181; Sutherlin v. Chesney (Kan. Sup.), 116 Pac. Rep. 254; Hayes v. Funk, 79 Kan. 416, 99 Pac. Rep. 1131; Badger L. Co. v. Martin (Kan.), 112 Pac. Rep. 104.

Oklahoma. Bloch v. Pearson, 19 Okl. 422, 91 Pac. Rep. 714.

² **Oregon.** See Equitable S. & L. Assoc. v. Hewitt (Oreg.), 106 Pac. Rep. 447, 450.

Washington. Actual agency of builder: See Pennsylvania C. Co. v. Washington P. C. Co. (Wash.), 116 Pac. Rep. 284.

³ **Washington.** Authority of common law agent of owner to construct: Driver v. Galland (Wash.), 109 Pac. Rep. 593, 594.

⁴ **California.** See Kast v. Miller & Lux (Cal. Sup.), 115 Pac. Rep. 932.

Colorado. Proof of facts tending to show agency: See M. McCreery v. Morrison (Colo.), 105 Pac. Rep. 876, 878.

Oregon. Compare Equitable S. & L. Assoc. (Oreg.), 106 Pac. Rep. 447, 450.

⁵ **California.** Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 461, 94 Pac. Rep. 775. See Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

Idaho. See Shaw v. Johnston, 17 Idaho 676, 107 Pac. Rep. 399.

Montana. See Lane v. Lane Potter L. Co., 40 Mont. 541, 107 Pac. Rep. 898.

Oklahoma. See Christy v. Union O. & G. Co. (Okl.), 114 Pac. Rep. 740; Shirley v. Union O. & G. Co. (Okl.), 114 Pac. Rep. 742.

Oregon. Power to construct, of mere agent to procure loan: See Equitable S. & L. Assoc. v. Hewitt (Oreg.), 106 Pac. Rep. 447, 450. See

Additional matter to foot-note 8.⁶

§ 575. Same. Statutory provision.⁷

§ 576. Same. When contract is void.⁸

§ 577. Person in possession as agent of owner.

Additional matter to foot-note 12.⁹

Additional matter to foot-note 13.¹⁰

§ 578. Same. Person working mine.

Additional matter to foot-note 16.¹¹

§ 579. Architect as agent.

Additional matter to foot-note 17.¹²

Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

Utah. See *Belknap v. Condon*, 34 Utah 213, 97 Pac. Rep. 111, 113, 114.

Washington. Compare *O'Brien v. Hopgood*, 49 Wash. 395, 95 Pac. Rep. 489.

Idaho. Contractor as special agent of owner: See *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Kansas. *Robert Garrett L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 180, 181.

Husband as common law agent of wife: See *Sutherland v. Chesney* (Kan. Sup.), 116 Pac. Rep. 254.

Utah. See *Belknap v. Condon*, 34 Utah 213, 97 Pac. Rep. 111, 113.

California. See § 1183 Code Civ. Proc., as amended May 1, 1911 (Stats. and Amdts. 1911, pp. 1313 et seq.).

California. The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

California. See *Western L. & M. Co. v. Merchants A. Co.*, 13 Cal. App. 4, 108 Pac. Rep. 891, 894.

Oregon. Claimant must connect himself with owner of building or his agent: *Litherland v. S. Morton Cohn R. E. & I. Co.*, 54 Oreg. 1, 100 Pac. Rep. 1, 102 Pac. Rep. 303; *Equitable S. & L. Assoc. v. Hewitt* (Oreg.), 106 Pac. Rep. 447, 450; *Crane Co. v. Erie H. Co.* (Oreg.), 112 Pac. Rep. 430.

Utah. See *Belknap v. Condon*, 34 Utah 213, 97 Pac. Rep. 111, 113, 114.

Washington. Authority of common law agent of owner to construct: See *Driver v. Galland* (Wash.), 109 Pac. Rep. 593, 594.

Oregon. See *Equitable S. & L. Assoc. v. Hewitt* (Oreg.), 106 Pac. Rep. 447, 450; *Crane Co. v. Erie H. Co.* (Oreg.), 112 Pac. Rep. 430.

Utah. Power to bind other members of mining partnership as agent: See *Bentley v. Brossard*, 33 Utah 396, 94 Pac. Rep. 736, 744.

¹² Architect as agent of owner:

§ 580. Presumption of agency raised.

Additional matter to foot-note 19.¹³

§ 581. Undue extension to statutory agency of rules applicable only to common-law agency.**§ 582. Personal liability of agent.**

Additional matter to foot-note 25.¹⁴

§ 583. Agency to receive notice of claims of subclaimants.

Additional matter to foot-note 28.¹⁵

§ 584. Principal bound by notice to agent.

Additional matter to foot-note 29.¹⁶

California. See *Seebach v. Kuhn*, 9 Cal. App. 485, 490, 99 Pac. Rep. 723.

Architect as common law agent of owner: See *Loma Prieta L. Co. v. Hinton*, 12 Cal. App. 766, 768, 108 Pac. Rep. 528. See § 572, this Supplement, ante.

Federal. See *Fuller v. Young & Co.*, 126 Fed. Rep. 343, 61 C. C. A. 245.

Washington. See *Camp v. Neufelder*, 49 Wash. 426, 95 Pac. Rep. 640.

Architect giving notice to surety for owner: See *Martin v. Empire State S. Co.*, 53 Wash. 290, 101 Pac. Rep. 876.

13 California. Secretary of corporation as its agent: See *Danaldson v. Orchard C. O. Co.*, 6 Cal. App. 641, 643, 92 Pac. Rep. 1046; *Eells v. Gray Bros. C. R. Co.*, 13 Cal. App. 33, 108 Pac. Rep. 735.

President as agent: See *Black v. Harrison H. Co.*, 155 Cal. 121, 99 Pac. Rep. 494.

Idaho. Acts of officers as to sales of material: See *Valley L. Co. v. McGilvery*, 16 Idaho 338, 101 Pac. Rep. 94.

Kansas. Acts of officers prohibited by by-laws: See *Hoffman v. Farmer's Co-op. S. Assoc.*, 78 Kan. 561, 97 Pac. Rep. 440, 443.

Oregon. President of corporation as agent: See *Harding v. Oregon-Idaho Co. (Oreg.)*, 110 Pac. Rep. 412, 415.

14 Oregon. *Peck v. Voget (Oreg.)*, 108 Pac. Rep. 120.

15 California. See *Pacific L. Co. v. Wilson*, 6 Cal. App. 561, 562, 92 Pac. Rep. 654.

16 California. See *Pacific L. Co. v. Wilson*, 6 Cal. App. 561, 562, 92 Pac. Rep. 654; *John R. Gentle Co. v. Britton*, 158 Cal. 328, 332, 111 Pac. Rep. 9. See *Western L. & M. Co. v. Merchants A. Co.*, 13 Cal. App. 4, 108 Pac. Rep. 891, 894.

Oklahoma. See *Hale v. Van Buren & M. Co. (Okl.)*, 103 Pac. Rep. 1026.

CHAPTER XXIX.

THIRD PERSONS.

§ 585. Scope of discussion.¹

§ 586. Purchasers and other lien-holders.

Additional matter to foot-note 1.²

Additional matter to foot-note 3.³

§ 587. Same. Defective claim of lien as notice to bona fide third parties.⁴

§ 588. Assignees. Assignment of inchoate right to lien.

Additional matter to foot-note 5.⁵

Additional matter to foot-note 6.⁶

Additional matter to foot-note 8.⁷

¹ As to rights of owners of abutting property, see § 523, this Supplement, ante.

As to rights of third persons arising out of negligence of independent contractor, see § 508, this Supplement, ante.

As to executors and administrators, see § 200, this Supplement, ante.

As to presentation of claims against estate of owner: See *Re Hinchon's Estate* (Cal. Sup.), 116 Pac. Rep. 47.

² See Priorities, § 487, et seq., this Supplement, ante.

³ *Washington*. As to rights of bona fide purchaser: See *Seattle L. Co. v. Cutler* (Wash.), 116 Pac. Rep. 1.

As to condemnation proceedings: See *North Coast Ry. Co. v. Hess*, 56 Wash. 335, 105 Pac. Rep. 853, 855.

⁴ See §§ 365 and 412, this Supplement, ante.

⁵ *Washington*. Assignment: See, generally, *Strandell v. Moran*, 49 Wash. 533.

⁶ *California*. See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 512, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Oregon. *Alderson v. Lee*, 52 Oreg. 92, 96 Pac. Rep. 234, 237 (logging lien—attorney as agent for both assignor and assignee of lien claim in preparing and filing claim of lien and assignment).

⁷ *Oregon*. Lien may also be foreclosed when it is agreed that assignment shall not become effective or be delivered until lien is perfected: *Alderson v. Lee*, 52 Oreg. 92, 96 Pac. Rep. 234, 237 (logging lien).

§ 589. Same. Formalities of assignment.

Additional matter to foot-note 9.⁸

§ 590. Same. Unaccepted order.

§ 591. Same. Assignment of debt necessary.⁹

§ 592. Same. Separate assignments of debt and security.

Additional matter to foot-note 14.¹⁰

§ 593. Same. Splitting demands.¹¹

§ 594. Same. Notice of assignment.¹²

§ 595. Same. General rights of assignee.

Additional matter to foot-note 20.¹³

Additional matter to foot-note 21.¹⁴

Additional matter to foot-note 23.¹⁵

§ 596. Same. Conditional acceptance.

§ 597. Same. Defenses arising subsequent to assignment.¹⁶

⁸ *Arizona*. Construction of assignment of lien: *Bank of Arizona v. Thomas Haverty Co.* (Ariz.), 115 Pac. Rep. 73.

Oregon. Formalities of assignment of logging lien: *Alderson v. Lee*, 52 Oreg. 92, 96 Pac. Rep. 234, 237 (also construction of assignment).

⁹ See § 20, this Supplement, ante.

¹⁰ *California*. Compare *Goldtree v. City of San Diego*, 8 Cal. App. 505, 512, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

¹¹ See §§ 533, this Supplement, ante. Strike from note 17 "See § 593, ante."

¹² As to assignability, see § 20, this Supplement, ante.

¹³ *California*. *O'Brien v. Garibaldi* (Cal. App.), 115 Pac. Rep. 249.

Colorado. *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 919.

¹⁴ *Colorado*. *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 919.

¹⁵ *Colorado*. *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 919.

¹⁶ See §§ 515 et seq., this Supplement, ante.

§ 598. Same. Assignment to surety on contractor's bond.¹⁷

§ 599. Same. Insolvency. Bankruptcy.
Additional matter to foot-note 30.¹⁸

§ 600. Same. Premature payments.¹⁹

§ 601. General creditors. Claimants losing lien. When neither the owner nor contractor raises any objection to the disposition of the balance of the fund, after the claims of lien holders are disposed of, an order or judgment that the balance of the fund be paid to the claimants who have not established their liens, if anything, is too favorable to them; and they can not be heard to object to such order on appeal, or to attack the judgment giving a lien to those who have established the same.²⁰

Additional matter to foot-note 36.²¹

Additional matter to foot-note 37.²²

Additional matter to foot-note 38.²³

Additional matter to foot-note 39.²⁴

¹⁷ See "Sureties," §§ 605 et seq., this Supplement, ante.

¹⁸ **California.** Discharge in bankruptcy defense against personal liability but not affecting lien: See *Jensen v. Dorr* (Cal. Sup.), 116 Pac. Rep. 553, 556; s. c., 157 Cal. 437, 108 Pac. Rep. 320 (on vessel). Compare, also *Blood v. Munn*, 155 Cal. 228, 100 Pac. Rep. 694.

Colorado. Bankruptcy, generally: See *Hawthorne v. Hendrie & Bolthoff Mfg. & S. Co.* (Colo.), 116 Pac. Rep. 122, 124.

Federal. Mechanics' liens collusively obtained unenforceable against general creditors in bankruptcy proceedings: In re *Kyte* (D. C., Pa.), 182 Fed. Rep. 166, 169.

¹⁹ See §§ 266, 563, this Supplement, ante.

²⁰ **California.** *Stockton L. Co. v. Schuler*, 155 Cal. 411, 414, 101 Pac. Rep. 307.

²¹ **California.** *Stockton L. Co. v. Schuler*, 155 Cal. 411, 414, 101 Pac. Rep. 307.

California. *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 522, 97 Pac. Rep. 414, 420.

²² **California.** See *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

²³ **California.** *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

²⁴ **California.** *Stockton L. Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. Rep. 307.

Additional matter to foot-note 40.²⁵

§ 602. Same. Attachment or process. Materials.²⁶

§ 603. Same. Garnishment. Where the original contractor dies after the levy of execution by way of garnishment against the owner on behalf of subclaimants recovering a personal judgment against the contractor, the failure of claimants to present their claims to the administrator or executor of the estate of the contractor does not affect their right to reduce to possession the debt due from the owner to the original contractor.²⁷

Additional matter to foot-note 42.²⁸

§ 604. Mortgages. Obligation to advance moneys for construction. The holder of a mechanic's lien upon property has no claim upon the insurance effected by the owner and assigned to the mortgagee after the loss.²⁹

Additional matter to foot-note 45.³⁰

Additional matter to foot-note 47.³¹

²⁵ *California*. *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 522, 97 Pac. Rep. 414, 420.

²⁶ See §§ 645 et seq., this Supplement, post.

²⁷ *California*. *Nordstrom v. Corona City W. Co.*, 155 Cal. 206, 213, 100 Pac. Rep. 242.

²⁸ *California*. *Garnishment*: See *Nordstrom v. Corona City W. Co.*, 155 Cal. 206, 214, 100 Pac. Rep. 242. See, also, § 521, this Supplement, ante.

²⁹ *Federal*. *Healey I. M. Co. v. Green (C. C., N. C.)*, 181 Fed. Rep. 890, 895.

Maine. See *Donnell v. Donnell*, 86 Me. 518, 30 Atl. Rep. 67.

North Carolina. See *Stamps v. Insurance Co.*, 77 N. C. 209, 29 Am. Rep. 443.

Texas. See *Galyon v. Ketchen*, 85 Tenn. 55, 1 S. W. Rep. 508 (assignment made before lienor's bill was filed).

³⁰ *Recovery by mortgagee of lien claims paid off* under terms of mortgage, see the following cases:

Indiana. *Standiford v. Shidler*, 26 Ind. App. 496, 60 N. E. Rep. 168.

Minnesota. *Price v. Doyle*, 34 Minn. 400, 26 N. W. Rep. 14.

Oregon. *Equitable S. & L. Assoc. v. Hewett (Oreg.)*, 106 Pac. Rep. 447, 450.

³¹ *Arizona*. Compare *Bank of Arizona v. Thomas Haverty Co. (Ariz.)*, 115 Pac. Rep. 73, 75.

§ 604a. **Presentation of claim to executor or administrator of owner.** As a general rule, claimants having a lien upon the property of the owner for labor bestowed or materials furnished need not present their claims to the executor or administrator of the owner in order to foreclose their liens; but if the owner's claimant desires to enforce a personal claim against the estate for any deficiency, such presentation is generally required.³²

³² **California.** In re Hinchon's Estate (Cal. Sup.), 116 Pac. Rep. 47.

Oregon. Brown v. Truax (Oreg.), 115 Pac. Rep. 597.

South Dakota. Fish v. De Laray, 8 So. Dak. 320, 66 N. W. Rep. 465.

Washington. See Casey v. Ault, 4 Wash. 167, 29 Pac. Rep. 1048.

CHAPTER XXX.

THIRD PERSONS (CONTINUED). SURETIES.

§ 605. Scope of chapter.

Additional matter to foot-note 1.¹

§ 606. Statutory requirement of contractor's bond.

Additional matter to foot-note 3.²

¹ **Kansas.** Action to recover on bond under Gen. Stats. 1909, § 6255 (Code Civ. Proc., § 660): See *Shores v. United S. Co.* (Kan.), 114 Pac. Rep. 1062.

Washington. Time of commencing suit: See *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280; *Martin v. Empire State S. Co.*, 53 Wash. 290, 101 Pac. Rep. 876.

Special limitation as to time of commencing action on bond, citing Washington cases in note of Treatise and following the doctrine set out in Oregon note of *Ausplund v. Aetna I. Co.*, 47 Oreg. 10, 81 Pac. Rep. 577, but citing other cases: See *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, arising out of liens foreclosed in *Jensen v. Sheard*, 49 Wash. 593, 96 Pac. Rep. 2. See, also, *Young Men's Christian Assoc. v. Gibson*, 58 Wash. 307, 108 Pac. Rep. 766, 768.

A corporation has no power to enter into a contract of suretyship or guaranty, unless the power is expressly conferred by its charter, or unless such a contract is reasonably necessary, or is usual, in the conduct of its business: *Spencer v. Alki P. T. Co.*, 53 Wash. 77, 101 Pac. Rep. 509, 512; *Donohue-Kelly B. Co. v. Savings Bank*, 13 Wash. 407, 43 Pac. Rep. 359, 942, 52 Am. St. Rep. 57. See, also, *Washington M. Co. v. Sprague L. Co.*, 19 Wash. 165, 52 Pac. Rep. 1067.

² **California.** See bond required by § 1183, Code Civ. Proc., as amended Stats. & Amdts. 1911, pp. 1313, et seq.

Colorado. Where a bond is not given for the benefit of those furnishing materials for or labor upon a building, but is conditioned to secure the faithful performance of the contract and the payment of all bills by the contractor in connection with the erection of the building, but the contract itself does not provide for the payment of such bills by the contractor, the sureties on the bond are not liable for such non-payment by the contractor, but otherwise, if the bond is given for the benefit of such laborers and material-men: *State Board of Agriculture v. Dimick*, 46 Colo. 609, 105 Pac. Rep. 1114. See § 626, this Supplement, post, note.

Bond to discharge liens:

Kansas. Where the statute provides that the bond shall be "conditioned for the payment of all claims which might be the basis of liens," and the bond given by the contractor to the owner, purporting to be under the mechanics' lien law, secures only "claims arising from the furnishing of labor and materials for the purpose hereinbefore recited," which purpose was limited to the erection of one certain building, or the bond is for a penal sum less than the amount re-

§ 607. Same. Application of provision.³

§ 608. Statutory bond. Formalities.³

Additional matter to foot-note 6.⁴

§ 609. Same. Statutory bond void.⁵

§ 610. Same. Contract void. Bond valid.

Additional matter to foot-note 10.⁶

Additional matter to foot-note 11.⁷

§ 611. Same. Liability on statutory bond.⁸

quired by the statute, for instance, "in a sum not less than the contract price," the bond is insufficient to discharge the claimants' liens: *Deatherage L. Co. v. Miles* (Kan.), 116 Pac. Rep. 505.

Insolvent sureties on statutory bond to release liens: See *Deatherage L. Co. v. Miles* (Kan.), 116 Pac. Rep. 505.

Oklahoma. Definition of "insure": To take or have effect; to serve to the use, benefit or advantage of a person: *Mean v. Callison* (Okla.), 116 Pac. Rep. 195.

³ **California.** See § 1183, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313, et seq.).

⁴ **Montana. Distinction exists between statutory undertaking and statutory bond,** consisting chiefly in the requirement that the principal must be a party to the former; while the person in whose behalf the latter is executed, need not be a party to it; and upon the question of the liability of sureties upon an official bond not signed by the principal, the authorities are in conflict (discussing two lines of cases): *Deer Lodge County v. United States F. & G. Co.* (Mont.), 112 Pac. Rep. 1060.

Oklahoma. Statutory bond to prevent attachment of liens not signed by principal but signed by two sureties, when the name of the principal appears in the body of the bond complies with § 4829, *Willson's Rev. & Ann. Stats.* 1903, and is valid against the sureties: *Daman v. Chamberlain* (Okla.), 110 Pac. Rep. 1056. Compare *Clark v. Bank of Hennessey*, 14 Okl. 572, 79 Pac. Rep. 217. See § 606, this Supplement, ante, note.

⁵ **California.** See § 1183, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313, et seq.), as to statutory bond, to be filed with original contract.

⁶ **California.** See *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c. (Cal. App.), 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423. See preceding note.

⁷ **California.** See *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423. See note 5, this section, ante.

⁸ **California.** See § 1183, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313, et seq.).

§ 612. Same. Statutory bond, when enforceable as a common-law obligation.⁹

§ 613. Common-law bonds. Formalities.

Additional matter to foot-note 14.¹⁰

Additional matter to foot-note 15.¹¹

§ 614. General rule of surety's liability. It is well-settled law that a surety may stand upon the strict letter of his bond, and that where the principal has, without the consent of the surety, materially violated the terms of the agreement for the performance of which the surety stands sponsor, the latter is exonerated from all liability upon his bond. This principle has been many times applied where the surety has

⁹ *California.* See § 1183, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313, et seq.).

¹⁰ See § 608, this Supplement, ante, note.

Washington.—A bond is an instrument under seal, and the common law rule that a seal imports a consideration still obtains in this state, notwithstanding the statute abolishing the use of private seals (Ballinger's Ann. Codes & St., § 4523): *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280; *Considine v. Gallagher*, 31 Wash. 669, 72 Pac. Rep. 469.

This rule is a positive rule of law and not a mere rule of procedure: *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280.

¹¹ *Idaho.* Where a building contract is signed by the original contractor, and is also signed by others, no mention being made of the names of the others or of their liability, in the body of the contract, and it is subsequently signed by the owner, the others are liable as sureties: *Sanders v. Keller* (Idaho), 111 Pac. Rep. 350. See, also, *Thompson v. Coffman*, 15 Oreg. 631, 16 Pac. Rep. 713; *Neil v. Morgan*, 28 Ill. 524; *Holmes v. State*, 17 Neb. 73, 22 N. W. Rep. 232; *Leith v. Bush*, 61 Pa. 395. See, also, Washington note, this section, post.

Washington. The mere subscription of a building contract by third persons under the words "in the presence of sureties," without showing their relation to such contract or to the parties thereto, can not be said to create any contractual relation, and such alleged contract can not be reformed so as to impose a liability upon such third persons: *Mead v. White*, 53 Wash. 638, 102 Pac. Rep. 753. See *Foote v. Robbins*, 50 Wash. 277, 278, 280, 97 Pac. Rep. 103; *Allen v. Kitchen* (Idaho), 100 Pac. Rep. 1052, 1056; *Board of Commissioners of Marion County v. Shipley*, 77 Ind. 553; *Lee v. Hills*, 66 Ind. 479; *Grant v. Naylor*, 4 Cranch 222, 2 L. ed. 603; *Glass v. Hurlbert*, 102 Mass. 24, 3 Am. Rep. 418.

The undertaking of such alleged sureties, being collateral, must be in writing: *Mead v. White*, *supra* (under Ballinger's Ann. Codes & Stats. § 4576; *Pierce's Code*, § 5343).

guaranteed the faithful performance of building contracts.¹² For example, where payments to the contractor have been prematurely made;¹³ where the owner failed to retain in his hands twenty-five per cent of the contract price as stipulated;¹⁴ where the owner has retained in his hands sufficient money to pay all liens;¹⁵ where there have been substantial deviations in the plans for the construction of the building.¹⁶ Mere knowledge of material change of plans or of the contract does not show consent of sureties sufficient to prevent their being exonerated.¹⁷

Additional matter to foot-note 19.¹⁸

Additional matter to foot-note 21.¹⁹

Additional matter to foot-note 22.²⁰

¹² *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 497, 99 Pac. Rep. 856 (petition for hearing in Supreme Court denied); s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹³ *Glenn v. Jones*, 146 Cal. 518, 80 Pac. Rep. 695.

¹⁴ *Bragg v. Shain*, 49 Cal. 131; *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹⁵ *Kllessig v. Allspaugh*, 91 Cal. 231, 27 Pac. Rep. 655.

¹⁶ *Judah v. Zimmerman*, 22 Ind. 388; *United States v. Corwine*, 1 Bond 339, Fed. Cas. No. 14,871; Civ. Code, § 2819; *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹⁷ *California*. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 497, 499, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹⁸ *California*. See *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 494, 99 Pac. Rep. 856, 863, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

Colorado. This is not a rule of construction but of the application of the contract after its meaning has been ascertained by the general rules applicable to the construction of contracts: *Hurlburt v. Klephart* (Colo. Sup.), 115 Pac. Rep. 521; *Covey v. Schliesswohl* (Colo.), 114 Pac. Rep. 292. See *People ex rel. v. Beach* (Colo.), 113 Pac. Rep. 513; *Sather B. Co. v. Briggs Co.*, 138 Cal. 724, 72 Pac. Rep. 352; *United States F. & G. Co. v. Board of Commissioners*, 145 Fed. Rep. 144, 76 C. C. A. 114.

Washington. *James Black M. & C. Co. v. National S. Co.* (Wash.), 112 Pac. Rep. 517, 519.

As to assignment of contract without consent of surety: See *Strandell v. Moran*, 49 Wash. 533, 95 Pac. Rep. 1106.

¹⁹ *California*. See *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

²⁰ *Washington*. See *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280.

As to application of payment: See *Hughes & Co. v. Flint* (Wash.), 112 Pac. Rep. 633.

§ 614a. **Death of contractor. Obligation of sureties.** If the obligations of the contractor under his contract survive him and are binding upon his estate after death, the sureties on his bond for the performance of the contract are as much bound to the performance of the contract as if he had continued to live; and must, if otherwise obligated, pay lien claims accruing after the death of the contractor, when his personal representative carries out the contract.²¹

§ 615. **Original contract as basis of liability.** Under the usual clause in building contracts providing for alterations of the original contract,²² where the contractor's bond is attached to the contract to construct a one-story building, alterations in the plans and specifications referred to have relation to such changes in a one-story building and not to such changes as would create a contract to erect a two-story building; and the surety on the bond is released, if a two-story building is erected.²³

²¹ **Washington.** *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. Rep. 436, 439.

²² Form 7, pp. 812, 813, Treatise.

²³ **California.** *Barrett-Hicks Co. v. Glas*, 9 Cal. 491, 499, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

Colorado. When it appears from the contract that payments are to be made only when the contractor furnishes receipted bills for all labor and materials in full, it is an express contract on the part of the contractor to pay for all such labor and materials that go into the building; and if the contractor's bond contains a provision that he is to perform such contract in its entirety, the contractor's sureties are liable to the owner for payments made to release the property from liens caused by non-payment of such bills by the contractor: *Covey v. Schlesswohl* (Colo.), 114 Pac. Rep. 292, 293, explaining *State Board of Agriculture v. Dimick*, 46 Colo. 609, 613, 105 Pac. Rep. 1114, as relating to a contract which, upon construction, did not require the contractor to pay bills for labor and materials for the building.

Where the contract does not require the contractor to pay for labor done upon or materials that enter into the construction of a state building, a bond to secure the performance of that contract can not be construed to extend to laborers and material-men, but is limited to the performance of the contract. A condition in the bond that such bills are to be paid, otherwise the bond shall be in force, must, in the absence of an agreement by the contractor to pay them, be considered a promise without consideration: *State Board of Agriculture v. Dimick*, 46 Colo. 609, 105 Pac. Rep. 1114, 1115. See, also, *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. Rep. 531, 39 Am. St. Rep. 618, 25 L. R. A. 257 (see notes); *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195;

Additional matter to foot-note 23.²⁴

Additional matter to foot-note 24.²⁵

§ 616. Auditing accounts, as provided in contract.

Additional matter to foot-note 25.²⁶

Green Bay L. Co. v. School District, 121 Iowa 663, 97 N. W. Rep. 72; **Montgomery v. Spencer**, 15 Utah 495, 50 Pac. Rep. 623.

See per contra: **Baker v. Bryan**, 64 Iowa 561, 21 N. W. Rep. 83; **Lyman v. City of Lincoln**, 38 Neb. 794, 57 N. W. Rep. 531; **Buffalo F. Co. v. Cullen, etc. Co.**, 105 Mo. App. 484, 79 S. W. Rep. 1024.

"An examination of the cases on this subject discloses, as said by the Supreme Court of Utah in **Montgomery v. Spencer**, 15 Utah 495, 50 Pac. Rep. 623, that generally there must be an express covenant that a contractor should pay the claims of those not immediate parties to a contract to entitle them to sue to enforce the penalty of a bond which is given to secure its performance. Since the complaint fails to allege that some provision of his contract with the state board required the builder to pay material-men and laborers, we must hold that the latter are not entitled to sue upon the guaranty bond as one given for their benefit. The distinction we have pointed out is well illustrated in the later Iowa cases. We have found no well-considered case where a guaranty bond is held to be for the benefit of those who are not parties to a contract, performance of which the bond secures, in the absence from the contract, either of an express agreement of the contractor to pay to such third persons for material or labor, or of such words as require of him, before final payment, the production of a receipt showing that no liens or claims therefor are in existence, or the production of receipts showing the payment of such bills, or some similar provision which the courts hold equivalent to an express contract to pay them": **State Board of Agriculture v. Dimick**, 46 Colo. 609, 105 Pac. Rep. 1114, 1115.

24 California. **Barrett-Hicks Co. v. Glas**, 9 Cal. App. 491, 497, 499, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. **Burnett v. Glas**, 154 Cal. 249, 97 Pac. Rep. 423.

Idaho. **Surety bound by construction given contract by acts of contractor:** See **Sanders v. Keller** (Idaho), 111 Pac. Rep. 350.

Washington. **Kracht v. Empire State S. Co.** (Wash.), 113 Pac. Rep. 773.

25 Colorado. **Contract made part of bond by reference:** See **Covey v. Schlesswohl** (Colo.), 114 Pac. Rep. 292.

Washington. **But where he consents to a change or modification of the contract, the surety can not avoid his liability for alterations, as stated in the text:** **Keeman v. Empire State S. Co.** (Wash.), 113 Pac. Rep. 636, 638.

26 California. **Certificates need not be given by a professional architect:** **Bacigalupi v. Phoenix B. & C. Co.** (Cal. App.), 112 Pac. Rep. 892, 895.

Washington. See **Lazelle v. Empire State S. Co.**, 58 Wash. 589, 109 Pac. Rep. 195, 197.

Subsequent agreement of surety after abandonment, whereby new contract is let; provision for auditing not applicable and surety bound: **Young Men's Christian Assoc. v. Gibson**, 58 Wash. 307, 108 Pac. Rep. 766, 769; likewise, if valid claims exceed penalty of bond: **Young Men's Christian Assoc. v. Gibson**, *supra*.

§ 617. Construction of bond.

Additional matter to foot-note 26.²⁷

§ 618. **Surety's rights.**²⁸ **Notice.** A clause in a contractor's bond that notice shall be "promptly and immediately" given to the surety upon knowledge of any default means that such notice must be given within a reasonable time; and it is for the jury to determine whether or not such notice has been given within a reasonable time.²⁹

Where the owner retains funds out of the contract price payable to the contractor, more than sufficient to meet all the demands against the building for materials furnished for and labor done on the same, and thereby frees the building from all liens, the sureties on the contractor's bond are exonerated from further obligation thereon.³⁰

Additional matter to foot-note 29.³¹

Surety not bound by certificate, if architect does not make personal examination and exercise personal judgment: *Ilse v. Aetna I. Co.*, 55 Wash. 487, 104 Pac. Rep. 787.

²⁷ **Washington.** If the claim would have been filed but for such payment: *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. Rep. 436, 439.

Law to be read into contract: *Lelendecker v. Aetna I. Co.*, 52 Wash. 609, 101 Pac. Rep. 219.

²⁸ **Colorado.** **Contractor's surety making payment to owner**, after abandonment by contractor: See *Rice v. Rhone (Colo.)*, 111 Pac. Rep. 585, 587.

Washington. **Surety need not file claim against estate of deceased contractor** from whom he received indemnifying mortgage, when he relies only upon mortgage foreclosure: *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. Rep. 436, 439.

²⁹ *Bacigalupi v. Phoenix B. & C. Co. (Cal. App.)*, 112 Pac. Rep. 892, 895; *Martin v. Empire State S. Co.*, 53 Wash. 290, 101 Pac. Rep. 876. See *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. Rep. 833, 46 L. ed. 1193; *Remington v. Fidelity & D. Co.*, 27 Wash. 429, 67 Pac. Rep. 989; *Fidelity & Deposit Co. v. Courtney*, 103 Fed. Rep. 599, 43 C. C. A. 331; *People's M. A. Assoc. v. Smith*, 126 Pa. 317, 17 Atl. Rep. 605, 12 Am. St. Rep. 870; *Van Buren v. American S. Co.*, 137 Iowa 490, 115 N. W. Rep. 24, 126 Am. St. Rep. 290; *Kentzler v. American M. Assoc.*, 88 Wis. 589, 60 N. W. Rep. 1002, 43 Am. St. Rep. 934; *Solomon v. Continental F. I. Co.*, 160 N. Y. 595, 55 N. E. Rep. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707; *Lyon v. Railway P. Assoc. Co.*, 46 Iowa 631; *Niagara F. I. Co. v. Scammon*, 100 Ill. 644; *Ward v. Maryland C. Co.*, 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514.

³⁰ **California.** *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

³¹ **Washington.** See § 626, this Supplement, post, note.

Additional matter to foot-note 30.³²

§ 619. Surety as lien claimant.

Additional matter to foot-note 31.³³

Additional matter to foot-note 32.³⁴

Additional matter to foot-note 33.³⁵

§ 620. Surety under legal obligation not to foreclose lien.

A contractor's surety who has guaranteed the delivery of the building free of liens can not enforce a lien against the building; but a partnership of which such surety may be a member is not necessarily barred from a lien for materials furnished by it, especially where it does not appear that the surety assumed to act in his capacity as a member of the

Failure to give notice to a surety company on the bond of the contractor for more than two months is only a defense in so far as the surety has been damaged or prejudiced by such failure; but a failure to give notice at an earlier date would release the surety from any claim for damages for demurrage, or for failure to complete the building in time, but not for damages arising from lien claims for labor or material: *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280.

Waiver of notice to surety of failure of contractor to perform: See *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280.

³² **Washington.** Compare *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, 1027.

Washington. Where the bond requires the owner to notify the surety of a breach of the contract, the surety can not complain of lack of notice of breach of contract as to minor details which are corrected, the owner thereby suffering no loss, nor where the surety can show no substantial damage or loss by reason of failure to receive notice in the exact and technical language of the contract, nor when it has not been prevented from taking proper steps for its protection: *Lazelle v. Empire State S. Co.*, 58 Wash. 589, 109 Pac. Rep. 195, 196; *Martin v. Empire State S. Co.*, 53 Wash. 290, 101 Pac. Rep. 876. Compare *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 96 Pac. Rep. 158, 160, 97 Pac. Rep. 464.

Surety completing contract after abandonment by contractor: See *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 96 Pac. Rep. 158, 160, 97 Pac. Rep. 464.

Notice to surety that it may contest final settlement: See *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 96 Pac. Rep. 158, 160, 97 Pac. Rep. 464.

³³ See § 620, this Supplement, post.

³⁴ See § 622 of Treatise, ante.

Idaho. See *Sanders v. Keller (Idaho)*, 111 Pac. Rep. 350, 352.

³⁵ See § 629 of Treatise, ante.

California. See *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 496, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

firm, and with relation thereto or connection therewith, or with the knowledge or assent of his copartners; and the court is warranted in concluding from the bond itself that he acted in his individual capacity, and the burden of proof that he acted with the authority of his copartners is upon the owner.³⁶

Where one of a copartnership is a surety on the contractor's bond in his individual capacity and without any relation to the copartnership or connection therewith, and without the knowledge, authorization or consent of his copartners, and subsequent to the date of the contract between the copartnership and the contractor for the furnishing of the materials for the building, the copartnership may file a lien for such materials furnished.³⁷

In case of exoneration of surety. If a surety on the contractor's bond for the delivery of the completed building free from liens is exonerated from liability by reason of the acts of the owner, the obligee, the rule preventing such surety from foreclosing a lien for materials furnished or labor performed on the building has no application.³⁸

Where a claimant merely accepts an assignment of the original contract as indemnity against loss as surety of the contractor and therefore to insure the proper application of the moneys due and to become due on the contract, and he in no sense assumes any liability to the owner or to those performing labor upon or furnishing materials for the structure, he may enforce a lien for materials furnished to the original contractor.³⁹

Additional matter to foot-note 34.⁴⁰

³⁶ *California*. *Burnett v. Glas*, 154 Cal. 249, 256, 97 Pac. Rep. 423. See s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 496, 99 Pac. Rep. 856, 111 Pac. Rep. 760.

³⁷ *California*. *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

³⁸ *California*. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 499, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

³⁹ *California*. *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

⁴⁰ See § 629 of Treatise, ante.

§ 621. Obligor of bond destroying security of surety.
Additional matter to foot-note 35.⁴¹

§ 622. Premature payments. Generally. But where a payment is not under the circumstances of the case deemed to be premature, the surety is not exonerated.⁴²
Additional matter to foot-note 37.⁴³
Additional matter to foot-note 39.⁴⁴
Additional matter to foot-note 40.⁴⁵

§ 623. Same. Intermediate instalments.
Additional matter to foot-note 41.⁴⁶

Idaho. The surety of the contractor can not maintain an action for the foreclosure of a lien for materials furnished where the full contract price has been paid to the contractor, but otherwise where the whole contract price has not been paid prior to the receipt of notice by the owner that the surety had such claim; where notice is given the owner would clearly not be justified in making further payments to the contractor, to the injury of the surety: *Sanders v. Keller* (Idaho), 111 Pac. Rep. 350.

⁴¹ **California.** See *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

Washington. *James Black M. & C. Co. v. National S. Co.* (Wash.), 112 Pac. Rep. 517, 519.

As to release of party to contract: See *Young Men's Christian Assoc. v. Gibson*, 58 Wash. 307, 108 Pac. Rep. 766, 768.

As to release of one partner of a firm of contractors: See *Young Men's Christian Assoc. v. Gibson*, 58 Wash. 307, 108 Pac. Rep. 766, 769.

⁴² **California.** *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892, 895.

⁴³ **California.** See *Russell v. Ross*, 157 Cal. 174, 106 Pac. Rep. 583.

Washington. *James Black M. & C. Co. v. National S. Co.* (Wash.), 112 Pac. Rep. 517, 519; *Leleendecker v. Aetna I. Co.*, 52 Wash. 609, 101 Pac. Rep. 219.

Contrary rule, where sureties are not injured: *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280. See § 618, this Supplement, ante, note.

A compensated surety will not be relieved of his obligation, unless it be shown that he has been in fact prejudiced by a breach of the contract, that is not merely technical but substantial, working a pecuniary disadvantage to the surety, or depriving him of some protection or privilege reserved in the bond: *James Black M. & C. Co. v. National S. Co.* (Wash.), 112 Pac. Rep. 517, 518, citing cases to Washington note in Treatise, and distinguishing *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. Rep. 833, and *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280.

⁴⁴ **California.** *Russell v. Ross*, 157 Cal. 174, 180, 106 Pac. Rep. 583 (Construction of a vessel).

⁴⁵ See § 619 of Treatise, ante.

⁴⁶ **California.** See *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 860;

§ 624. Same. Final instalment.

Additional matter to foot-note 45.⁴⁷

§ 625. Liability of sureties.⁴⁸ Damages.

Additional matter to foot-note 46.⁴⁹

Additional matter to foot-note 49.⁵⁰

s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

Washington. But see *Young Men's Christian Assoc. v. Gibson*, 58 Wash. 337, 108 Pac. Rep. 766, 769.

If the building contract provides for a round sum and does not stipulate for the time when payment shall be made, the guarantor of the contract is not discharged by the owner making payments to the contractor as the work progresses and before it is completed: *Lelendecker v. Aetna I. Co.*, 52 Wash. 609, 101 Pac. Rep. 219, 220.

⁴⁷ **California.** *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 860; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

Washington. Notice to surety of final settlement: See *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 96 Pac. Rep. 158, 160, 97 Pac. Rep. 464.

⁴⁸ **Washington.** A secret understanding not amounting to a contract between the owner and contractor whereby the latter was to receive security not exonerating surety: See *Martin v. Empire State S. Co.*, 53 Wash. 290, 101 Pac. Rep. 876.

⁴⁹ **California.** Attorney's fees recoverable: *Klokke v. Raphael*, 8 Cal. App. 1, 5, 96 Pac. Rep. 392, distinguishing *Burnett v. Glas* (Cal. App.), 97 Pac. Rep. 423 on the ground that the fund was not exhausted in that case and that the contract was void and that the owner wrongfully refused to pay a large amount in his hands in excess of all claims of lien against his property.

Washington. No recovery for delay caused by owner: See *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, 1027.

Damages for delay; surety not exonerated: See *Keenan v. Empire State S. Co.* (Wash.), 113 Pac. Rep. 636, 638.

Only attorneys' fees in defending lien cases actually paid recoverable as damages: *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, 1027.

Showing amount of claims as damages, whether claims brought into action or not: See *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 96 Pac. Rep. 158, 159, 97 Pac. Rep. 464.

As to recovery of costs: See *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, 1027.

Failure of owner to make payment. A surety company is not exonerated because the owner fails to make payment at the time payment is due according to contract, where there is nothing to show that the certificate required was ever presented for payment, or that the want of payment was a cause in any degree of the failure of the contractor to finish the building according to the agreement: *Martin v. Empire State S. Co.*, 53 Wash. 290, 101 Pac. Rep. 876.

⁵⁰ **California.** Right and duty of owner to make loss as light as possible, upon abandonment, and upon refusal of surety to complete contract, owner may do so: *Russell v. Ross*, 157 Cal. 174, 106 Pac. Rep. 583.

Colorado. See *Rice v. Rhone* (Colo.), 111 Pac. Rep. 585, 587.

Additional matter to foot-note 50.⁵¹

§ 626. Bond of contractor on public work.

Additional matter to foot-note 51.⁵²

⁵¹ **Idaho.** Admissions that there are no charges for extras binding on surety as part of *res gestae*: See *Sanders v. Keller* (Idaho), 111 Pac. Rep. 350, 352.

Washington. Surety not liable to owner for work done by claimant which is not a substantial performance of the contract: See *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 96 Pac. Rep. 158, 160, 97 Pac. Rep. 464.

No recovery against surety for extra work not covered by contract or bond: See *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, 1027.

⁵² **Bond of contractor on public work:**

California. See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 508, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218; *City S. I. Co. v. Kroh*, 158 Cal. 318, 110 Pac. Rep. 933, 938.

Colorado. Duty of public authorities to take bond: *State Board of Agriculture v. Dimick*, 46 Colo. 609, 105 Pac. Rep. 1114.

Bond must be for benefit of claimants: See *State Board of Agriculture v. Dimick*, 46 Colo. 609, 105 Pac. Rep. 1114.

See § 615 this Supplement, ante, note.

Idaho. Compare *Rathbun v. State*, 15 Idaho 273, 97 Pac. Rep. 335, 336.

Kansas. Compare *National S. Co. v. Wyandotte C. & L. Co.*, 76 Kan. 914, 92 Pac. Rep. 1111.

Washington. Notice to owner: See *Strandell v. Moran*, 49 Wash. 533, 95 Pac. Rep. 1106 (over statement of amount).

Notice to surety: *Cascade L. Co. v. Aetna I. Co.*, 56 Wash. 503, 106 Pac. Rep. 158; *Minneapolis S. & M. Co. v. Aetna I. Co.*, 56 Wash. 699, 106 Pac. Rep. 160.

Delivery of duplicate statement under mechanics'-lien law not applicable under Laws 1909, c. 45, § 1: *Gate City L. Co. v. City of Montezano* (Wash.), 111 Pac. Rep. 799.

Second notice to cure defects in first notice, under § 5925 Ballinger's Ann. Codes & St. (§ 6121, Pierce's Code): See *Cascade L. Co. v. Aetna I. Co.*, 56 Wash. 503, 106 Pac. Rep. 158; *Minneapolis S. & M. Co. v. Aetna I. Co.*, 56 Wash. 699, 106 Pac. Rep. 160.

As to proceedings under this statute, see, generally, *Fransioi v. Thompson*, 55 Wash. 259, 104 Pac. Rep. 278, 280.

CHAPTER XXXI.

WAIVER, FORFEITURE, AND RELEASE OF LIEN.

§ 627. **Waiver of lien. General principle.** An agreement to waive the lien of one who performs labor upon or furnishes materials for a building must be certain and must be clearly and unequivocally established;¹ and if such agreement is subject to conditions subsequent which are not performed by the other party the claimant does not waive his lien.² By merely agreeing that he will save the owner harmless from liens, the contractor does not waive his own rights to a lien. Such a clause will be construed to mean liens except his own.³

Additional matter to foot-note 1.⁴

Additional matter to foot-note 3.⁵

§ 628. **Same. Statutory provision.**⁶

§ 629. **Same. Knowledge of lack of authority of employer.**

Additional matter to foot-note 5.⁷

¹ *Illinois*. *Concord A. H. Co. v. O'Brien*, 128 Ill. App. 437.

Pennsylvania. *Nice v. Walker*, 153 Pa. 123, 25 Atl. Rep. 1065, 34 Am. St. Rep. 688.

Washington. *Pac. L. & T. Co. v. Dalley* (Wash.), 111 Pac. Rep. 869, 870; *Holm v. Chicago M. & P. S. Ry. Co.* (Wash.), 109 Pac. Rep. 799, 801.

² *Washington*. *Pac. L. & T. Co. v. Dalley* (Wash.), 111 Pac. Rep. 869, 870.

See Release, § 634, this Supplement, post.

³ *Washington*. *Rhone v. Chicago M. & P. S. Ry. Co.* (Wash.), 109 Pac. Rep. 799, 801.

Wisconsin. *Davis v. Lacrosse H. Assoc.*, 121 Wis. 579, 99 N. W. Rep. 351.

⁴ *Colorado*. As to waiver of lien by giving credit solely to the person: Compare *Rice v. Rhone* (Colo.), 111 Pac. Rep. 585.

⁵ *Illinois*. *Concord A. H. Co. v. O'Brien*, 128 Ill. App. 437.

Washington. *Holm v. Chicago M. & P. S. Ry. Co.* (Wash.), 109 Pac. Rep. 799, 801.

⁶ See §§ 510 et seq., ante.

California. § 1201 Code Civ. Proc. was not amended in 1911.

⁷ *Washington*. As to estoppel, see *Seattle L. Co. v. Cutler* (Wash.), 116 Pac. Rep. 1.

§ 630. Same. Taking additional security. There was nothing in the Mechanics' Lien Law of California before the amendment of 1911 which would release the owner of the building from the operation of the lien to which a claimant was entitled by reason of the fact that a third person had assumed the relation of guarantor of the debt. The creditor could not be presumed to have waived his lien by having taken this additional security.⁸

Additional matter to foot-note 6.⁹

Additional matter to foot-note 7.¹⁰

§ 631. Same. Entry of judgment.

Additional matter to foot-note 12.¹¹

§ 632. Forfeiture by false or excessive claim or notice.

Additional matter to foot-note 15.¹²

§ 633. Same. Illustrations.

Additional matter to foot-note 23.¹³

Additional matter to foot-note 24.¹⁴

⁸ **California.** Barrett-Hicks Co. v. Glas, 99 Pac. Rep. 865, 111 Pac. Rep. 760; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 92 Pac. Rep. 423.

⁹ **Washington.** See Pac. L. & T. Co. v. Dalley (Wash.), 111 Pac. Rep. 869, 870; Fairbanks-Morse & Co. v. Union B. T. Co., 55 Wash. 538, 104 Pac. Rep. 815, 817.

¹⁰ **Washington.** See Bowles v. Fraser (Wash.), 109 Pac. Rep. 812.

¹¹ **Oklahoma.** Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 547.

Oregon. Following Marean v. Stanley, 5 Colo. App. 335; Benbow v. The James Johns (Oreg.), 108 Pac. Rep. 634, 638.

Utah. State ex rel. Dorset v. Morse (Utah), 103 Pac. Rep. 969.

¹² **California.** Lucas v. Gobbi, 10 Cal. App. 648, 651; Stockton L. Co. v. Schuler, 155 Cal. 411, 414.

Forfeiture by change in law: See D. I. Nofziger L. Co. v. Waters, 10 Cal. App. 89, 91, 101 Pac. Rep. 38.

See §§ 35-38 Treatise and this Supplement.

¹³ **California.** See Lucas v. Gobbi, 10 Cal. App. 648, 651, 103 Pac. Rep. 157.

¹⁴ **Alaska.** Pioneer M. Co. v. Delamotte (C. C. A.), 185 Fed. Rep. 852, 855.

Colorado. Barnes v. Colorado Springs & C. C. D. Ry. Co., 42 Colo. 461, 94 Pac. Rep. 570, 573.

Kansas. Home L. & S. Co. v. School Dist. (Kan.), 115 Pac. Rep. 590.

Washington. Strandell v. Moran, 49 Wash. 533, 95 Pac. Rep. 1106; Bellingham v. Linck, 53 Wash. 208, 101 Pac. Rep. 843, 844.

§ 634. Release of lien.¹⁵

Additional matter to foot-note 25.¹⁶

§ 635. Same. Composition agreement. Definition. Offer and tender of a less amount by a debtor to the creditor which clearly discloses to the creditor that it is in full satisfaction of a disputed claim, and retention of the amount by the creditor, constitute an accord and satisfaction.¹⁷

§ 636. Same. Agreement to assign claims to owner.¹⁸**§ 637. Same. Effect of composition agreement.¹⁹**

¹⁵ **California.** See release of lien by filing contract and bond under amendment of 1911, Stats. & Amdts. 1911, pp. 1313 et seq.

¹⁶ **Colorado.** Agreement to release must be clearly established: Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 35.

New Mexico. Insurance company not subrogated to the rights of lienholder upon payment of claim under policy of insurance: Burton-Lingo Co. v. Patton (N. M.), 107 Pac. Rep. 679, 682, 683.

Washington. As to release of only personal liability of owner: See Seattle L. Co. v. Cutler (Wash.), 116 Pac. Rep. 1.

¹⁷ **California.** Weller v. Stevens, 12 Cal. App. 779, 108 Pac. Rep. 532.

Colorado. Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 35.

¹⁸ **California.** See Goldtree v. City of San Diego, 8 Cal. App. 505, 509, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

¹⁹ **Accord and satisfaction:**

Idaho. See Heath v. Potlach L. Co., 18 Idaho 42, 108 Pac. Rep. 343.

Kansas. See Mathemy v. City of Eldorado, 82 Kan. 720, 109 Pac. Rep. 166.

Washington. See Seattle R. & S. Ry. Co. v. Seattle-Tacoma P. Co. (Wash.), 116 Pac. Rep. 289.

Wyoming. See City of Rawlins v. Jungquist, 16 Wyo. 403, 96 Pac. Rep. 96, 144.

Additional matter to foot-note 8.⁵

§ 641. Same. Actions by original contractor.

Additional matter to foot-note 10.⁶

Additional matter to foot-note 12.⁷

Additional matter to foot-note 13.⁸

§ 642. Same. Actions by subclaimants.

Additional matter to foot-note 21.⁹

Additional matter to foot-note 22.¹⁰

Additional matter to foot-note 25.¹¹

Additional matter to foot-note 26.¹²

722, 95 Pac. Rep. 827, 828, 96 Pac. Rep. 573; *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 799, 92 Pac. Rep. 980.

Oklahoma. Either at law or in equity: See *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 820.

Utah. State ex rel. *Dorset v. Morse* (Utah), 103 Pac. Rep. 969.

Washington. *Pacific L. & T. Co. v. Dalley* (Wash.), 111 Pac. Rep. 869, 870.

⁵ **California.** *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. Rep. 640, 650.

As to proceeding in rem under street improvement act of 1885: See *Los Angeles County v. Winans*, 109 Pac. Rep. 640, 648; s. c., 13 Cal. App. 234, 109 Pac. Rep. 650.

Kansas. See *New v. Smith*, 68 Kan. 807, 74 Pac. Rep. 610.

Minnesota. See *Sanders v. Calsson*, 13 Minn. 379, 45 N. W. Rep. 15.

Montana. Compare *Gassert v. Strong*, 38 Mont. 18, 98 Pac. Rep. 497, 500.

Oklahoma. *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

⁶ **California.** See *Carlson v. Sheehan*, 157 Cal. 692, 695, 109 Pac. Rep. 29.

Colorado. See *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 695.

Oregon. See *Adams v. Mackenzie* (Oreg.), 114 Pac. Rep. 460.

Washington. Action against personal representative of owner: See *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. Rep. 436, 438.

⁷ **Washington.** Compare *Evans v. Oregon & W. R. Co.*, 58 Wash. 429, 108 Pac. Rep. 1095.

⁸ **California.** *Carlson v. Sheehan*, 157 Cal. 692, 695, 109 Pac. Rep. 29.

⁹ **Oklahoma.** See *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

¹⁰ **Washington.** *Tsutakawa v. Kumamoto*, 53 Wash. 231, 102 Pac. Rep. 766, 101 Pac. Rep. 869.

¹¹ **Oklahoma.** See *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

¹² **California.** Action to reach funds in the hands of municipality for sewer work. See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 508, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Additional matter to foot-note 29.¹³

§ 643. Same. Actions by owner's laborers and material-men.

§ 644. Same. Actions by owner.

Additional matter to foot-note 32.¹⁴

Additional matter to foot-note 36.¹⁵

§ 645. Provisional remedies. Statutory provision.

§ 646. Same. Attachment.

Additional matter to foot-note 41.¹⁶

§ 647. Same. Materials exempt from attachment.

Additional matter to foot-note 44.¹⁷

§ 648. Same. Injunction.

Additional matter to foot-note 45.¹⁸

¹³ **California.** See *Hubbard v. Lee*, 10 Cal. App. 477, 478, 102 Pac. Rep. 528; s. c., 6 Cal. App. 602, 92 Pac. Rep. 744.

¹⁴ **California.** **Damages for failure to deliver material:** *Fairchild-Gillmore-Wilton Co. v. Southern R. Co.*, 158 Cal. 264, 110 Pac. Rep. 951.

Washington. **Action upon decease of contractor against personal representative:** See *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. Rep. 436, 438.

¹⁵ **Washington.** **Action on bond:** See *Monro v. National S. Co.*, 47 Wash. 488, 92 Pac. Rep. 280.

See §§ 605 et seq., this Supplement, ante.

¹⁶ **California.** **Attachment** now allowed claimant under § 1197 Code Civ. Proc., as amended Stats. & Amdts. 1911, pp. 1313 et seq.

Montana. **Attachment:** See *Elsenhauer v. Quinn*, 36 Mont. 368, 93 Pac. Rep. 38.

¹⁷ **Washington.** **Attachments for fraud "in contracting debt."** Where materials not used in performance of contract are charged up against the building at the instance of the contractor attempting to dispose of his property: See *Gordon v. Gillespie*, 58 Wash. 62, 109 Pac. Rep. 109, 111.

¹⁸ **New Mexico.** **Enjoining sale of property** upon which lien has been foreclosed: See *Robertson v. Mine & S. S. Co. (N. M.)*, 110 Pac. Rep. 1037.

CHAPTER XXXIII.

TIME, PLACE, AND MANNER OF COMMENCING ACTIONS TO FORECLOSE LIEN.

§ 649. Time of commencing actions to foreclose.¹

Additional matter to foot-note 1.²

Additional matter to foot-note 2.³

§ 650. Same. Action to foreclose lien upon the fund.⁴

¹ See § 605, this Supplement, ante.

² **California.** Action for damages for abandonment against contractor and his sureties is not prematurely brought, because commenced before the building is completed; as the cause of action accrues as soon as the contractor abandons the contract: *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892, 894. See *Taylor v. North P. C. R. R. Co.*, 56 Cal. 317.

Ohio. See *Cincinnati & S. Ry. Co. v. Village of Carthage*, 36 Ohio St. 631.

California. Limitation of action in suit on garnishment by way of execution at the instance of original contractor's subclaimants who have failed to establish their liens, but who have recovered personal judgment against original contractor: See *Nordstrom v. Corona City W. Co.*, 155 Cal. 206, 214, 100 Pac. Rep. 242.

Kansas. See *Sutherland v. Chesney* (Kan.), 116 Pac. Rep. 254.

Statute of limitations upon an obligation growing immediately out of written contract regarding drilling of wells: See *Bailey v. Fredonia G. Co.*, 82 Kan. 746, 109 Pac. Rep. 411, 413.

Washington. Action on contractor's bond: See *Martin v. Empire State S. Co.*, 53 Wash. 290, 101 Pac. Rep. 876; *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, 1026.

³ **California.** Where the claim of lien was filed December 28, 1906, and the complaint was filed March 27, 1907, it was filed within the ninety days described by § 1190, Code Civ. Proc.: *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

Washington. *Rees v. Willson*, 50 Wash. 339, 97 Pac. Rep. 245.

Failure to make real owner party until after time limited by statute owing to fraud of owner: See *Rees v. Willson*, 50 Wash. 339, 97 Pac. Rep. 245.

Washington. Special limitation of time to commence action: See *Jensen v. Sheard*, 49 Wash. 593, 96 Pac. Rep. 2; *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024.

Limitation on second claim filed and action on second claim within statutory period, action not barred: *Lindley v. McGlaulin*, 58 Wash. 636, 109 Pac. Rep. 118, 120; s. c., 57 Wash. 581, 107 Pac. Rep. 355.

⁴ See §§ 547 et seq., Supplement, ante.

§ 651. Place of commencing action to foreclosure. Generally. A mechanic's lien is enforceable only in the state by the statute of which it is created; if the rule were otherwise, it would have the effect of attributing to the decree the force and effect of a judgment in rem by a court having no jurisdiction over the res.⁵

Additional matter to foot-note 11.⁶

§ 652. Same. Statutory provision.

§ 653. Same. Jurisdiction of superior court.

Additional matter to foot-note 17.⁷

§ 654. Same. Amount less than jurisdictional limit. But where the complaint fails to state a cause of action for the foreclosure of the lien, the superior court has no jurisdiction if it does show a cause of action for a money judgment for less than three hundred dollars.⁸

Additional matter to foot-note 18.⁹

§ 655. Same. Foreclosure of lien in Federal Courts. The Circuit Court of the United States has jurisdiction to entertain a bill in equity to foreclose a mechanic's lien, although

⁵ *Burton-Lingo Co. v. Patton* (N. M.), 107 Pac. Rep. 679, 680, 681; *Carpenter v. Strange*, 141 U. S. 105, 11 Sup. Ct. 960, bk. 35, L. ed. 101; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. Rep. 3, 54 L. ed. —; *Davis v. Headley*, 22 N. J. Eq. 115; *Cooley v. Scarlet*, 38 Ill. 316, 87 Am. Dec. 298; *Gardner v. Ogden*, 22 N. Y. 227, 78 Am. Dec. 192.

⁶ *Oklahoma. Change of venue:* See *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

⁷ *California.* See *Goldtree v. City of San Diego*, 8 Cal. App. 505, 508, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Oklahoma. Jurisdiction of District Court: See *Dallas v. Pitchford* (Okl.), 115 Pac. Rep. 1110.

⁸ *California.* *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. Rep. 78.

⁹ *California.* See *Paterson v. McDonald* (Cal. App.), 110 Pac. Rep. 465, 466.

Utah. See *Volker-Scowcroft L. Co. v. Vance* (Utah), 103 Pac. Rep. 970, 972; s. c., 33 Utah 74, 88 Pac. Rep. 896.

Washington. When lien on steam shovel falls, if pleadings and evidence justify it, court has jurisdiction to render money judgment: *Pacific I. & S. Works*, 55 Wash. 149, 104 Pac. Rep. 151. As to appellate jurisdiction: See *Hall v. Cowen*, 51 Wash. 295, 98 Pac. Rep. 670.

the state statute may give an action at law, especially where there are conflicting liens upon the property, which a court of equity alone can adjust.¹⁰ But it can not foreclose such lien on its law side.¹¹

§ 656. Manner of commencing actions to foreclose.

Additional matter to foot-note 20.¹²

§ 657. Same. Summons.

Additional matter to foot-note 21.¹³

Additional matter to foot-note 22.¹⁴

¹⁰ *Healey I. M. Co. v. Green* (C. C., N. C.), 181 Fed. Rep. 890, 893; *Sheffield F. Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. Rep. 936, 37 L. ed. 853.

¹¹ *Armstrong Cork Co. v. Merchants R. Co.* (C. C., Mo.), 171 Fed. Rep. 778, 779; s. c. (C. C. A.), 184 Fed. Rep. 199.

As to jurisdiction of Federal Courts to enforce mechanics' liens: See *Gilchrist v. Helena H. S. & S. R. Co.*, 58 Fed. Rep. 708.

As to jurisdiction of state courts to foreclose lien on interest of lessee of school lands, fee being in United States, no attempt being made to foreclose lien on interest of the Federal Government: *Jarrell v. Block*, 19 Okl. 467, 92 Pac. Rep. 167, 169.

¹² **Insufficient commencement of action on law side of Circuit Court:** *Armstrong Cork Co. v. Merchants R. Co.* (C. C., Mo.), 184 Fed. Rep. 199.

¹³ **California. Service of summons by publication:** See *People v. Patrick Mulcahey* (Cal. Dec. 27, 1910).

Colorado. Summons need not be issued on claimants' cross-complaint to foreclose lien nor need it be served upon principal contractor: *Barnes v. Colorado Springs and C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573.

Service of summons upon copartnership and binding interests of copartnership: See *Barnes v. Colorado Springs and C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 572.

Idaho. Constructive service not authorizing personal or money judgment: *Naylor & Norlin v. Lewiston & S. E. Ry. Co.*, 14 Idaho 722, 95 Pac. Rep. 827, 828, 96 Pac. Rep. 573.

New Mexico. Without notice or opportunity to be heard, or service of process, judgment of foreclosure absolutely void against owner: *Robertson v. Mine & S. S. Co.* (N. M.), 110 Pac. Rep. 1037.

Oklahoma. Subcontractor may recover amount due his subclaimant not served with process, but no judgment in favor of such subclaimants can be rendered if the court has not acquired jurisdiction of such subclaimant, although he may be party to action: *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547.

Washington. Waiver of defects in summons or service: See *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. Rep. 843.

¹⁴ **California. Sufficient affidavit of service of summons by publication:** See *Roberts v. Jacob*, 154 Cal. 307, 97 Pac. Rep. 671.

Colorado. Sufficient return of service of summons on partner: See *Barnes v. Colorado Springs and C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 572.

§ 658. Same. Lis pendens.

Additional matter to foot-note 23.¹⁵

¹⁵ Lis pendens:

Arizona. See *Brandt v. Scribner* (Ariz.), 108 Pac. Rep. 492.

Colorado. See *Buckhorn P. Co. v. Consolidated P. Co.* (Colo.), 108 Pac. Rep. 27.

Washington. Compare *Biggs v. Hoffman* (Wash.), 111 Pac. Rep. 576.

CHAPTER XXXIV.

PARTIES.

§ 659. Parties plaintiff. Statutory provision.

Additional matter to foot-note 1.¹

§ 660. Same. Object of provision.²

§ 661. Same. Raising objection.

§ 662. Parties defendant. Generally.³

Additional matter to foot-note 11.⁴

§ 663. Same. Owner. The owner must be made a party to the action to foreclose a mechanic's lien, if his property is to be made chargeable with the claim for which the lien is given.⁵

Additional matter to foot-note 14.⁶

Additional matter to foot-note 15.⁷

¹ **Arizona.** Suit by assignee of claim: *Harper v. Independence D. Co.* (Ariz.), 108 Pac. Rep. 701, 703.

Kansas. President and not corporation real party in interest. See *Shores v. United S. Co.* (Kan.), 114 Pac. Rep. 1062.

² See §§ 460 et seq., this Supplement, ante.

³ See notes, post, this chapter.

⁴ **Colorado.** Bringing in other partners defendant: See *Barnes v. Colorado Springs and C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 572.

Washington. Contractor and his surety as parties defendant. See *City of Spokane v. Costello*, 57 Wash. 183, 106 Pac. Rep. 764, 767.

All persons connected with contract conceived to be liable may be joined as defendants: *Fransloli v. Thompson*, 55 Wash. 259, 104 Pac. Rep. 278, 280.

⁵ **California.** *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. Rep. 640, 650.

⁶ **California.** See *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 270, 97 Pac. Rep. 516 (threshing machine).

Idaho. Right of wife to defend: See *Larson v. Carter*, 14 Idaho 511, 94 Pac. Rep. 825, 827.

Washington. Owner deceiving claimant made party after time limited for commencing action: See *Rees v. Wilson*, 50 Wash. 339, 97 Pac. Rep. 245.

⁷ **Washington.** Husband and wife as parties defendant: See *Rasmussen v. Liming*, 50 Wash. 184, 96 Pac. Rep. 1044.

§ 664. Same. Employers. Copartnerships.

Additional matter to foot-note 17.⁸

Additional matter to foot-note 18.⁹

§ 665. Same. Contractor. It is immaterial to show, so far as the rights of lien claimants are concerned, that the contractor named in and who executed the original contract was a mere figure-head, and that other persons, even those seeking to assert liens, or who were sureties on the contractor's bond, are the real parties in interest.¹⁰

Additional matter to foot-note 19.¹¹

Additional matter to foot-note 20.¹²

§ 666. Same. Subcontractor.¹³**§ 667. Same. Lien claimants.**

Additional matter to foot-note 23.¹⁴

§ 668. Same. Holders of prior interests and liens.¹⁵

Additional matter to foot-note 25.¹⁶

Additional matter to foot-note 30.¹⁷

§ 669. Same. Interests pendente lite.¹⁸

⁸ **Oregon. Mechanic's lien filed by partnership, copartner not necessary party:** See *Ban v. Columbia S. R. Co.*, 117 Fed. Rep. 21, 54 C. C. A. 407, reversing s. c., 109 Fed. Rep. 499.

⁹ **Washington. Administrator of contractor and surety as parties:** See *City of Spokane v. Costello*, 57 Wash. 183, 106 Pac. Rep. 764, 767.

¹⁰ **California. Barrett-Hicks Co. v. Glas**, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹¹ **California. Los Angeles P. B. Co. v. Higgins**, 8 Cal. App. 514, 521, 97 Pac. Rep. 414, 420.

Washington. Contractor and wife as parties defendant: See *Rasmussen v. Liming*, 50 Wash. 184, 96 Pac. Rep. 1044.

Contractor's administrator as party: See *City of Spokane v. Costello*, 57 Wash. 183, 106 Pac. Rep. 764, 767.

¹² **Oklahoma. Contractor necessary party:** *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 546.

¹³ See §§ 66-76, generally, *Treatise and Supplement*, as to subcontractors.

¹⁴ **Oklahoma.** See *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547.

¹⁵ See "Priorities," §§ 486 et seq., this Supplement.

¹⁶ **Washington.** Compare *Biggs v. Hoffman* (Wash.), 111 Pac. Rep. 576.

¹⁷ **California.** *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 270, 97 Pac. Rep. 516.

¹⁸ See *Lis Pendens*, § 658, this Supplement, ante.

CHAPTER XXXV.

COMPLAINT.

§ 670. Complaint. In general.

Additional matter to foot-note 1.¹

§ 671. Stating cause of action.² The better practice is to allege the facts as they occurred, and leave the Court to draw the conclusion that the property is subject to the lien.³

Additional matter to foot-note 5.⁴

Additional matter to foot-note 6.⁵

§ 672. General rules of pleading contract.

Additional matter to foot-note 9.⁶

Additional matter to foot-note 11.⁷

Additional matter to foot-note 12.⁸

¹ California. Action by owner against contractor's surety: See *Klokke v. Raphael*, 8 Cal. App. 1, 4, 96 Pac. Rep. 392.

Colorado. Alleging cause of action on contractor's bond: See *State Board of Agriculture v. Dimick*, 46 Colo. 609, 105 Pac. Rep. 1114.

Foreign corporation; alleging performance of prerequisites for doing business:

Idaho. See *Valley L. Co. v. Eriessell*, 13 Idaho 662, 93 Pac. Rep. 765, 771.

Washington. *North Star T. Co. v. Alaska-Yukon Pac. Exposition (Wash.)*, 115 Pac. Rep. 855.

² Oregon. Alleging "valid liens" in complaint of mortgagee who paid same under terms of mortgage, a conclusion of law: *Equitable S. & L. Assoc. v. Hewitt (Oreg.)*, 106 Pac. Rep. 447, 450.

³ California. *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

⁴ Oregon. *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1031; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

⁵ California. *Seebach v. Kuhn*, 9 Cal. App. 485, 490, 99 Pac. Rep. 723.

Colorado. *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 965, 966.

⁶ California. *Boyd v. Bargagliotti*, 12 Cal. App. 223, 237, 107 Pac. Rep. 150. See *Naylor v. Adams (Cal. App.)*, 115 Pac. Rep. 335.

⁷ California. *Boyd v. Bargagliotti*, 12 Cal. App. 223, 237, 107 Pac. Rep. 150.

Pleading modification of contract: See *Reed v. Harshall*, 12 Cal. App. 697, 700, 108 Pac. Rep. 719.

⁸ California. "The general rule of law is that while a special con-

§ 673. Same. Common counts.

Additional matter to foot-note 16.⁹

Additional matter to foot-note 17.¹⁰

Additional matter to Paragraph 1.¹¹

Additional matter to Paragraph 2.¹²

tract remains open—that is, unperformed—the party whose part of it has not been done cannot sue in *indebitatus assumpsit* to recover compensation for what he has done until the whole is completed.”

“But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with that contract. In such a case the party cannot recover the remuneration stipulated for in the contract because he has not done that which was to be the consideration of it.”

“Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such remuneration as the benefit conferred is really worth; and, to recover it, an action in *indebitatus assumpsit* is maintainable. In such an action, the defendant may be allowed by way of counterclaim or setoff to recoup himself in damages for injuries or detriment sustained by him because of plaintiff's failure to comply with the obligations imposed upon him by the contract”: *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 43, quoting from the opinion of Justice Wayne, in *Dermott v. Jones*, 23 How. (U. S.), 220. See *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237, 107 Pac. Rep. 150.

Utah. See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004.

California. *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237; *Carlson v. Sheehan*, 157 Cal. 692, 695, 109 Pac. Rep. 29; *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 41, 106 Pac. Rep. 413. See, generally, *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 520, 97 Pac. Rep. 414, 420.

Colorado. *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 965, 966. See *Harvey v. Denver & R. G. R. Co.*, 44 Colo. 258, 99 Pac. Rep. 31, 33.

Oregon. Promise to pay need not be alleged in *indebitatus assumpsit*; *Pioneer H. Co. v. Farrin* (Oreg.), 107 Pac. Rep. 456.

Utah. See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004.

Account stated:

California. See *Stimson M. Co. v. Hughes Mfg. Co.*, 8 Cal. App. 559, 97 Pac. Rep. 322.

Idaho. See *Naylor v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, 578; s. c., 95 Pac. Rep. 827.

Colorado. *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 695.

Utah. See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004, 1007.

Colorado. *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 695.

California. *Seebach v. Kuhn*, 9 Cal. App. 485, 490, 99 Pac. Rep. 723.

Colorado. *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. Rep. 695.

§ 674. Same. Technical defects cured by acts of the parties.

Additional matter to foot-note 18.¹³

§ 674a. Same. Estoppel. Waiver. If a litigant relies upon matter of waiver or estoppel to sustain his cause of action or defense, he must specially plead such matter.¹⁴ But where the pleader is without knowledge that his demand must ultimately rest upon estoppel, he is not obliged to plead it.¹⁵

§ 675. Same. Express contract.

Additional matter to foot-note 20.¹⁶

Additional matter to foot-note 21.¹⁷

§ 676. Same. Conditions precedent. As to conditions precedent in a contract, under the statute, it may be stated generally that the party duly performed all the conditions on his part.¹⁸

Additional matter to foot-note 22.¹⁹

¹³ **California.** See *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 41, 106 Pac. Rep. 413.

Oregon. See *McInnis v. Buchanan*, 53 Oreg. 229, 99 Pac. Rep. 929, 930.

¹⁴ **California.** See *Seebach v. Kuhn*, 9 Cal. App. 485, 489, 99 Pac. Rep. 723; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. Rep. 298, 60 Pac. Rep. 974, 66 Pac. Rep. 982.

Colorado. *Gillett v. Young*, 45 Colo. 562, 101 Pac. Rep. 766, 768.

Washington. The facts constituting equitable estoppel should be pleaded, not the conclusion: *City of Spokane v. Costello*, 57 Wash. 183, 106 Pac. Rep. 764.

¹⁵ **California.** *Hubbard v. Lee*, 6 Cal. App. 602, 609, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

¹⁶ **California.** See *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157. Compare *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 764; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹⁷ **California.** See *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237, 107 Pac. Rep. 150.

¹⁸ **California.** *Needham v. Chandler*, 8 Cal. App. 124, 127, 96 Pac. Rep. 325. See *City S. & I. Co. v. Marysville*, 155 Cal. 419, 432, 101 Pac. Rep. 308.

¹⁹ **California.** *Coplew v. Durand*, 153 Cal. 278, 279, 95 Pac. Rep. 38. **Arbitration as condition precedent:** *Burke v. Dittus*, 8 Cal. App. 175, 178, 96 Pac. Rep. 330.

Additional matter to foot-note 23.²⁰

§ 677. **Same. Completion of building.**²¹

§ 678. **Same. Certificate of architect.**

Additional matter to foot-note 26.²²

§ 679. **Same. Prevention of performance.**

Additional matter to foot-note 29.²³

§ 680. **Same. Debt due.** The averment that a specific sum "is now due and owing," although a statement of a legal conclusion, is sufficient to support a judgment by the court.²⁴ It is not necessary to allege that there is anything due from the owner to the contractor, where the lien is direct.²⁵

§ 681. **Same. Non-payment of indebtedness to plaintiff.**

Additional matter to foot-note 33.²⁶

§ 682. **Same. Premature payment to contractor by owner.**

Additional matter to foot-note 35.²⁷

Oregon. See *McInnis v. Buchanan*, 53 Oreg. 229, 99 Pac. Rep. 929, 930.

Washington. *Owen v. Casey*, 48 Wash. 673, 94 Pac. Rep. 473.

20 California. *Coplew v. Durand*, 153 Cal. 278, 279, 95 Pac. Rep. 38.

Montana. *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 671.

²¹ See §§ 334 et seq., this Supplement, ante.

22 California. *City S. I. Co. v. Marysville*, 155 Cal. 419, 432, 101 Pac. Rep. 308.

Montana. *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 671.

Oregon. The complaint need not allege in terms the presentation of such certificate: *McInnis v. Buchanan*, 53 Oreg. 229, 99 Pac. Rep. 929, 930.

23 California. See *Carlson v. Sheehan*, 157 Cal. 692, 695, 109 Pac. Rep. 29.

24 California. *Burke v. Dittus*, 8 Cal. App. 175, 178, 96 Pac. Rep. 330.

25 California. *Western L. & M. Co. v. Merchants' A. Co.*, 13 Cal. App. 4, 108 Pac. Rep. 891, 894.

²⁶ See § 680, this Supplement, ante, and see § 689, this Supplement, post.

27 California. See *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

§ 683. Notice to owner.

Additional matter to foot-note 36.²⁸

§ 684. Same. Indebtedness due contractor from owner at time of notice.

Additional matter to foot-note 40.²⁹

§ 685. Same. Complaint by subcontractor's material-man.³⁰

§ 686. Same. Notice to contractor. Action against fund.³¹

§ 687. Request of owner. Subclaimant.

§ 688. Contract alleged presumed to be non-statutory.

Additional matter to foot-note 44.³²

§ 689. Void contract. It is not necessary to allege that anything was due from the owner to the contractor at the time of filing the claim of lien where the lien became direct by reason of the failure to comply with the requirements of the statutory original contract.³³

§ 690. Same. Agreed price. Value. Where the plaintiff does not recover upon an express statutory original contract which has not been filed and was therefore void, but

²⁸ **California.** Compare *Klokke v. Raphael*, 8 Cal. App. 1, 4, 96 Pac. Rep. 392.

²⁹ **California.** *Beck v. Schmidt*, 13 Cal. App. 448, 110 Pac. Rep. 455, 457; *Irwin v. Insurance Co. of N. A.* (Cal. App.), 116 Pac. Rep. 294. See *Trels v. Berlin D. W. & L. Co.* (Cal. App.), 105 Pac. Rep. 275, 276; *Burke v. Dittus*, 8 Cal. App. 175, 178, 96 Pac. Rep. 330.

Utah. *Chesney v. Chesney*, 33 Utah 503, 94 Pac. Rep. 989.

³⁰ See "Material-man," §§ 77 et seq., this Supplement, ante.

³¹ See §§ 547 et seq., this Supplement, ante.

³² **California.** See *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

³³ **California.** *Western L. & M. Co. v. Merchants' A. Co.*, 13 Cal. App. 4, 108 Pac. Rep. 891, 894; *Lucas v. Gobbi*, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

Statutory original contract abolished by Stats. & Amdts. 1911, pp. 1313, et seq.

upon a quantum meruit, the validity of the contract as between the parties is not called into question.³⁴

Additional matter to foot-note 50.³⁵

§ 691. Same. Request of owner. Where the contract was void and the lien direct, it was held sufficient to allege that the material was furnished through the contractor as the agent of the owner,³⁶ or the plaintiff was at liberty to allege the facts as they occurred or to aver a direct agreement with the owner.³⁷

Additional matter to foot-note 51.³⁸

§ 692. Ownership.

Additional matter to foot-note 52.³⁹

§ 693. Knowledge of improvement by owner.

Additional matter to foot-note 57.⁴⁰

§ 694. Notice of non-responsibility.⁴¹

§ 695. Agency. Authority of person causing improvement to be made.

Additional matter to foot-note 62.⁴²

³⁴ **California.** Lacy Mfg. Co. v. Los Angeles G. & E. Co., 12 Cal. App. 37, 43, 106 Pac. Rep. 413.

³⁵ **California.** Coghlan v. Quartararo (Cal. App.), 115 Pac. Rep. 664, 666. See Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520, 97 Pac. Rep. 414, 420.

³⁶ **California.** Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

³⁷ **California.** Lucas v. Rea, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

³⁸ **California.** Lucas v. Rea, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

³⁹ **California.** See Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. Rep. 981, 986.

⁴⁰ **Nevada.** See Tonopah L. Co. v. Nevada A. Co., 30 Nev. 445, 97 Pac. Rep. 636, 639.

Oregon. Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

⁴¹ See §§ 469 et seq., this Supplement, ante.

⁴² **Oregon.** Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 71, 100 Pac. Rep. 1, 102 Pac. Rep. 303.

§ 696. Same. Mining claim.⁴³

§ 697. Same. Contractor as agent of owner.
Additional matter to foot-note 69.⁴⁴

§ 698. Same. Allegations to bind contractor.⁴⁵

§ 699. Materials.
Additional matter to foot-note 73.⁴⁶

§ 700. Same. Defect in complaint waived.

§ 701. Same. Materials furnished. Dates.⁴⁷

§ 702. Employment. Death of owner.

§ 703. Nature of labor.⁴⁸

§ 704. Same. Grading and other work.^{48a}

§ 705. Object of labor. Well.⁴⁹

§ 706. Claim of lien. Time of filing. The complaint must
not show that the claim of lien was prematurely filed.⁵⁰

Additional matter to foot-note 87.⁵¹

Additional matter to foot-note 88.⁵²

⁴³ See Agency, §§ 542 et seq., this Supplement, ante.

⁴⁴ California. And likewise where the statutory original contract was void: *Lucas v. Gobbl*, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

Oregon. See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202, 204.

⁴⁵ See "Contractor," §§ 45 et seq., this Supplement, ante.

⁴⁶ Colorado. See *Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573.

New Mexico. See *Stearns-Roger Mfg. Co. v. Aztec M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710.

⁴⁷ See §§ 77 et seq., this Supplement, ante.

⁴⁸ See §§ 130 et seq., this Supplement, ante.

^{48a} See §§ 133, 139, 156 et seq., this Supplement, ante.

⁴⁹ See §§ 166 et seq., this Supplement, ante.

⁵⁰ California. *Baker v. Lake L. C. & I. Co.*, 7 Cal. App. 482, 484, 94 Pac. Rep. 773.

⁵¹ Oregon. *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202.

⁵² Oregon. *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 181; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

§ 707. Same. Statutory completion for purpose of filing.
Additional matter to foot-note 92.⁵³

§ 708. Same. Alleging contents of claim. Generally.
The complaint must show that the claim of lien filed contained the matters required by the statute and was filed in the proper place within the proper time.⁵⁴
Additional matter to foot-note 93.⁵⁵

§ 709. Same. Name of owner.
Additional matter to foot-note 94.⁵⁶

§ 710. Same. Description of property to be charged with the lien.
Additional matter to foot-note 95.⁵⁷

§ 711. Same. Claim of lien as exhibit to complaint.
Additional matter to foot-note 96.⁵⁸
Additional matter to foot-note 97.⁵⁹

§ 712. Same. Terms, time given, and conditions of contract.
Additional matter to foot-note 98.⁶⁰

Washington. *Cornellius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

⁵³ **California.** See *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

⁵⁴ **California.** *Davis v. Treacy*, 8 Cal. App. 295, 97 Pac. Rep. 78.

⁵⁵ **Oregon.** Alleging verification of claim: See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202.

Washington. See *Cornellius v. Washington S. L.*, 52 Wash., 272, 100 Pac. Rep. 727, 729.

⁵⁶ **California.** Compare *Lucas v. Gobbi*, 10 Cal. App. 648, 653, 103 Pac. Rep. 157.

Oregon. See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202.

⁵⁷ **California.** See *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. Rep. 78.

Oregon. See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202.

⁵⁸ **California.** See *Lucas v. Gobbi*, 10 Cal. App. 648, 653, 103 Pac. Rep. 157.

⁵⁹ **Washington.** *Cornellius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

⁶⁰ **Oregon.** See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202.

§ 713. **Same. Variance between claim as an exhibit and allegations of complaint.**

Additional matter to foot-note 99.⁶¹

§ 714. **Same. Unnecessary statements in claim as an exhibit.**

§ 715. **Other interests. For what purpose alleged.**

Additional matter to foot-note 101.⁶²

§ 716. **Same. Alleging no other claim upon fund.**

Additional matter to foot-note 106.⁶³

§ 717. **Description of property.**⁶⁴

§ 718. **Same. Land for convenient use and occupation.**⁶⁵

§ 719. **Same. Description of whole or part of building.**⁶⁶

§ 720. **Same. Description in claim of lien referred to.**⁶⁶

§ 721. **Damages.**

Additional matter to foot-note 119.⁶⁷

§ 722. **Verification of complaint.**⁶⁸

⁶¹ **California.** See *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

⁶² **Oregon.** Mortgagee alleging payment of lien as permitted by mortgage must state all the material facts showing that the same were liens upon the property, and not mere conclusions of law: *Equitable S. & L. Assoc. v. Hewitt* (Oreg.), 106 Pac. Rep. 447, 450.

⁶³ **Washington.** See *North Coast Ry. Co. v. Hess*, 56 Wash. 335, 105 Pac. Rep. 853.

⁶⁴ See §§ 399 et seq., this Supplement, ante.

⁶⁵ See §§ 440 et seq., this Supplement, ante.

⁶⁶ See §§ 399 et seq., this Supplement, ante.

⁶⁷ **As to damages:**

California. See *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892; *Fairchild-Gilmore-Wilton Co. v. Southern R. Co.*, 158 Cal. 264, 110 Pac. Rep. 951, 953; *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 41, 106 Pac. Rep. 413; *Sherman v. Gray*, 11 Cal. App. 348, 104 Pac. Rep. 1004.

⁶⁸ See § 410, this Supplement, ante.

§ 723. Joinder of causes of action in complaint.

Additional matter to foot-note 122.⁶⁹

Additional matter to foot-note 123.⁷⁰

§ 724. Same. Designating causes of action separately.**§ 725. Same. Reference from one cause of action to another.**

Additional matter to foot-note 127.⁷¹

§ 726. Same. Actions that may be united in one complaint.

Additional matter to foot-note 130.⁷²

§ 727. Same. Objections, how raised.

Additional matter to foot-note 132.⁷³

69 Joinder of actions on express contract and implied contract:

Colorado. See *Hall v. Cudahy*, 46 Colo. 324, 104 Pac. Rep. 415.

Oregon. See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202, 204.

Washington. See *Holm v. Chicago M. & P. S. Ry. Co.* (Wash.), 109 Pac. Rep. 799.

70 Montana. See *Neuman v. Grant*, 36 Mont. 77, 92 Pac. Rep. 43.

Oklahoma. See *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

71 California. Compare *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 40, 106 Pac. Rep. 413.

72 Utah. Joinder of legal and equitable causes of action: See *Volker-Scowcroft L. Co. v. Vance* (Utah), 103 Pac. Rep. 970, 972; s. c., 33 Utah 74, 88 Pac. Rep. 896.

73 Colorado. *Hall v. Cudahy*, 46 Colo. 324, 104 Pac. Rep. 415.

CHAPTER XXXVI.

DEMURRER.

§ 728. Demurrer. Generally.

Additional matter to foot-note 1.¹

§ 729. General demurrer. Where the complaint stated a cause of action on the implied promise or quantum meruit, a general demurrer was properly overruled, although it referred to the statutory original contract, which had not been filed, and was therefore void.²

Additional matter to foot-note 3.³

§ 730. Same. Filing claim of lien. Time of completion of building. If it appears from the complaint that the claims of lien were filed prematurely, a general demurrer should be sustained in an action to foreclose the lien.⁴

Additional matter to foot-note 7.⁵

¹ California. Harmless error in overruling demurrer on the ground of insufficiency of complaint as to damage: See Bacigalupi v. Phoenix B. & C. Co. (Cal. App.), 112 Pac. Rep. 892.

Action to recover attorneys' fees expended in suit to foreclose lien; demurrer: See Klokke v. Raphael, 8 Cal. App. 1, 4, 96 Pac. Rep. 392.

Colorado. See Hall v. Cudahy, 46 Colo. 324, 104 Pac. Rep. 514.

Idaho. Failure of foreign corporation to comply with statutory prerequisites; demurrer must be special, not general: Valley L. Co. v. Driessel, 13 Idaho 662, 93 Pac. Rep. 765, 771.

² California. Lacy Mfg. Co. v. Los Angeles G. & E. Co., 12 Cal. App. 37, 43, 106 Pac. Rep. 413.

³ California. A demand in the prayer is a sufficient statement of the amount of damages sustained as against general demurrer, where the facts stated sustain a judgment for damages in an action against the contractor and the contractor's sureties for damages for breaches of contract: Bacigalupi v. Phoenix B. & C. Co. (Cal. App.), 112 Pac. Rep. 892.

New Mexico. Joint demurrer: See Gray v. New Mexico P. S. Co. (N. M.), 110 Pac. Rep. 603, 605.

Washington. Failing to allege written agreement for arbitration: See Owen v. Casey, 48 Wash. 673, 94 Pac. Rep. 473.

⁴ California. Baker v. Lake L. C. & I. Co., 7 Cal. App. 482, 484, 94 Pac. Rep. 773.

⁵ California. See Lucas v. Gobbi, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

§ 731. **Same. Cessation from work.**⁶

§ 732. **Same. Claim of lien not setting forth plans and specifications.**

Additional matter to foot-note 11.⁷

§ 733. **Same. Variance between claim as exhibit and body of complaint.**⁸

§ 734. **Special demurrer. Misjoinder of parties.** Where there is not an entire failure to allege non-payment, the averment is simply defective and can be reached only by special demurrer directed to that point.⁹

Additional matter to foot-note 14.¹⁰

§ 735. **Same. Ambiguity and uncertainty.**¹¹ **Conflict between claim as exhibit and body of complaint.** A special demurrer addressed to the complaint generally is properly overruled.¹²

Additional matter to foot-note 16.¹³

⁶ See §§ 354 et seq., this Supplement, ante.

⁷ **New Mexico.** Where there is nothing in the complaint to show that the contract had such fault in the claim of lien, and did not express the terms, time given and conditions of the contract, it is not subject to general demurrer on this ground: *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 604.

⁸ See § 735, and "Variances," §§ 835, et seq., this Supplement, post.

⁹ **California.** *Burke v. Dittus*, 8 Cal. App. 175, 177, 96 Pac. Rep. 330.

¹⁰ **Oklahoma.** See *Choctaw O. & G. R. Co. v. Burgess*, 21 Okl. 653, 97 Pac. Rep. 271; *Davis v. Caruthers (Okl.)*, 97 Pac. Rep. 581.

Oregon. Misjoinder of causes of action: See *Bohn v. Wilson*, 53 Oreg. 490, 101 Pac. Rep. 202, 204.

Washington. See *City of Spokane v. Costello*, 57 Wash. 183, 106 Pac. Rep. 764, 767; *Fransloli v. Thompson*, 55 Wash. 259, 104 Pac. Rep. 278, 280.

¹¹ **Washington. Uncertainty:** See *Dickerman v. Reeder (Wash.)*, 109 Pac. Rep. 1060.

¹² **California.** *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 40, 106 Pac. Rep. 413.

¹³ **Colorado.** See *Hall v. Cudahy*, 46 Colo. 324, 104 Pac. Rep. 415.

Montana. Where allegations in different counts in a complaint to foreclose the lien are inherently contradictory, and both cannot possibly be true, complaint is demurrable: *Neuman v. Grant*, 36 Mont. 77, 92 Pac. Rep. 43.

Additional matter to foot-note 17.¹⁴

§ 736. **Same. Conflict. Bond as exhibit and allegations of complaint.**¹⁵

§ 737. **Same. Conclusions of law.**
Additional matter to foot-note 20.¹⁶

¹⁴ **California.** Lucas v. Rea, 10 Cal. App. 641, 102 Pac. Rep. 322, 101 Pac. Rep. 537.

¹⁵ See "Sureties," §§ 605 et seq., this Supplement, ante.

¹⁶ **California.** Amount "due and owing"; special demurrer: See Burke v. Dittus, 8 Cal. App. 175, 178, 96 Pac. Rep. 330.

"Amount due"; special demurrer: See Burke v. Dittus, supra.

Oregon. "Valid liens"; general demurrer: See Equitable S. & L. Assoc. v. Hewitt (Oreg.), 106 Pac. Rep. 447, 450.

CHAPTER XXXVII.

ANSWER, AND OTHER PLEADINGS.

§ 738. Answer. In general.

Additional matter to foot-note 1.¹

§ 739. Same. General denial.

Additional matter to foot-note 3.²

§ 740. Same. Denials of conclusions of law. Ordinarily the words "due," "owing," and "payable," are conclusions of law, denial of which raises no issue.³

§ 741. Same. Negative pregnant.

Additional matter to foot-note 8.⁴

§ 742. Same. Denials on information and belief.

Additional matter to foot-note 13.⁵

§ 743. Same. Exception to rule.

¹ **Idaho.** Failure of foreign corporations to comply with domestic law; objection made by answer: *Valley L. Co. v. Driessel*, 13 Idaho 662, 93 Pac. Rep. 765, 771.

Kansas. Statute of limitations growing immediately out of written contract relating to drilling of wells: See *Bailey v. Fredonia G. Co.*, 82 Kan. 746, 109 Pac. Rep. 411, 413.

Oregon. Reply to new matter in answer; departure: See *Pioneer H. Co. v. Farrin* (Oreg.), 107 Pac. Rep. 456.

Defense as to agency: See *Equitable S. & L. Assoc. v. Hewitt* (Oreg.), 106 Pac. Rep. 447, 450.

² **Washington.** Special defense inconsistent with general denial: See *Helmer v. Title I. & G. Co.*, 50 Wash. 411, 97 Pac. Rep. 451, 452.

³ **California.** *Irwin v. Ins. Co. of N. A.* (Cal. App.), 116 Pac. Rep. 294.

⁴ **Washington.** Failure to deny authority of agent: See *Driver v. Galland*, 58 Wash. 62, 109 Pac. Rep. 593, 595.

⁵ **Idaho.** As to filing articles of incorporation and designating agent of foreign corporation: See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 800, 92 Pac. Rep. 980.

Washington. *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. Rep. 752.

§ 744. Same. Evasive denials.

Additional matter to foot-note 17.⁶

§ 745. Same. Deficiencies of complaint cured by answer.

§ 746. Same. Special defenses. Where a structure is destroyed before completion, for instance, where a bridge is carried away by floods, the failure of the owner to derive benefits from the work performed by the contractors, if the loss be occasioned through fault of the owner, for example, by failing to provide the material as required by the contract, is no defense in an action based upon a common count or quantum meruit.⁷

§ 747. Same. Neglect of contractor to supply materials and proceed with work.⁸

§ 748. Same. Abandonment.⁹

§ 749. Same. Payments made by owner.¹⁰

§ 750. Same. Void contract as defense.¹¹

§ 751. Same. Void contract no defense in personam.¹²

§ 752. Same. Mechanic's lien as defense to mortgage foreclosure.

§ 753. Same. Counterclaim. Payments.¹³

⁶ **Washington.** Compare *Helmer v. Title I. & G. Co.*, 50 Wash. 411, 97 Pac. Rep. 461, 462.

⁷ **California.** *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237, 107 Pac. Rep. 150.

⁸ See §§ 519, 520 and 523, et seq., this Supplement, ante.

⁹ See preceding note.

¹⁰ See §§ 547 et seq., this Supplement, ante.

¹¹ **California.** The Statutory Original Contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

¹² See preceding note.

¹³ See §§ 515 et seq., this Supplement, ante.

§ 754. Same. Judgment and costs in action against agent.¹⁴

§ 755. Same. Orders paid.¹⁵

§ 756. Same. Damages.
Additional matter to foot-note 44.¹⁶

§ 757. Same. Future repairs.

§ 758. Same. Damages for delay.
Additional matter to foot-note 49.¹⁷

§ 759. Cross-complaint.
Additional matter to foot-note 50.¹⁸

§ 760. Same. Setting up mechanic's lien in mortgage foreclosure.

§ 761. Same. Damages.
Additional matter to foot-note 55.¹⁹

¹⁴ See "Agency," §§ 572 et seq., ante.

¹⁵ Colorado. Payment, special defense: Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 32.

Release or accord and satisfaction must be specially pleaded: Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 33.

Oklahoma. Defense by one or two joint original contractors that the other original contractor agreed with him to furnish certain material to erect the building; held not available in an action by subclaimants to foreclose a lien, but that his remedy was against the other contractor: Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 548.

¹⁶ Kansas. Wichita S. & D. Co. v. Well, 80 Kan. 606, 103 Pac. Rep. 1003, 1005; Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 14 L. R. A. (N. S.), 918.

As to damages: See Badger L. Co. v. Martin (Kan.), 112 Pac. Rep. 104, 105.

Washington. But damages cannot be set up for defective material put into the building against a subclaimant: Rieflin v. Grafton (Wash.), 115 Pac. Rep. 851, 853.

Setting up damages for delay: See Dickerman v. Reeder (Wash.), 109 Pac. Rep. 1060.

¹⁷ Idaho. Damages for delay: See Steltz v. Armory Co., 15 Idaho 551, 99 Pac. Rep. 98, 101.

¹⁸ Colorado. Issuing summons on cross-complaint of claimant not required: Barnes v. Colorado Springs & C. C. D. Ry. Co., 42 Colo. 461, 94 Pac. Rep. 570, 573.

¹⁹ Kansas. So, also as against subcontractor: Wichita S. & D. Co.

§ 762. Same. Payments.²⁰

§ 763. Supplemental answer. Decree of foreclosure of mortgage.²¹

v. Well, 80 Kan. 606, 103 Pac. Rep. 1003, 1005; Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428, 92 Pac. Rep. 833, 14 L. R. A. (N. S.), 918.

²⁰ See § 755, note 15, this Supplement.

²¹ See "Decree," generally, §§ 903 et seq., this Supplement, post.

CHAPTER XXXVIII.

EVIDENCE.

§ 764. Scope of chapter.

Additional matter to foot-note 3.¹

§ 765. General rule as to exclusion of evidence.² Where the owner does not comply with the statutory requirements as to filing the original contract and notice of completion he is not in position to claim strict exclusion of all testimony tending to show his own acts and conduct in relation to the fact as to when the building was completed.³

Additional matter to foot-note 4.⁴

Additional matter to foot-note 5.⁵

Additional matter to foot-note 6.⁶

§ 766. Admissions.⁷

¹ **Idaho.** The rule as to admission of evidence in suit to foreclose lien, when no question of fact is submitted to the jury is much more liberal: *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 799, 92 Pac. Rep. 980.

Letters as evidence:

Colorado. *Idaho G. C. M. & M. Co. v. Colorado I. W. Co.* (Colo.), 111 Pac. Rep. 553 (self-serving).

Montana. *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 673.

Payment:

Kansas. Evidence of payment against subclaimants: *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833, 836.

Oregon. Indefinite evidence as to payment: See *Laughlin v. Connors*, 54 Oreg. 184, 102 Pac. Rep. 793.

² **Washington.** Evidence must be introduced in support of the allegations of the complaint denied in the answer: *Helmer v. Title I. & G. Co.*, 50 Wash. 411, 97 Pac. Rep. 451, 452.

³ **California.** *Hubbard v. Lee*, 6 Cal. App. 602, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

⁴ **Kansas.** *McCullough v. S. J. Hayde C. Co.*, 82 Kan. 734, 109 Pac. Rep. 176.

⁵ **Kansas.** See *McCullough v. S. J. Hayde C. Co.*, 82 Kan. 734, 109 Pac. Rep. 176.

⁶ **Washington.** *Cornellus v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

⁷ **Idaho.** Statements or admissions by the principal in the course of the performance of a building contract are binding on his surety

Additional matter to foot-note 9.⁸

Additional matter to foot-note 10.⁹

§ 767. Attorney's fees.

Additional matter to foot-note 11.¹⁰

§ 768. Description of property.

Additional matter to foot-note 12.¹¹

Additional matter to foot-note 13.¹²

§ 769. Extent of land for convenient use and occupation.

Additional matter to foot-note 14.¹³

attempting to foreclose lien, as they are part of the *res gestae*. So, where he admits that he has no charge for extras: *Sanders v. Keller* (Idaho), 111 Pac. Rep. 350, 352.

Kansas. Admissions by owner to subcontractor during period allowed to file claim admissible: *Fossett v. Rock Island L. & Mfg. Co.*, 76 Kan. 428, 92 Pac. Rep. 833.

Montana. Admission that claimant would testify to truth of items set out in the lien statement leaves question as to what credits shall be allowed to the owner to be proved: *Mills v. Olsen* (Mont.), 115 Pac. Rep. 33, 34.

Washington. After abandonment of performance of contract to his surety, latter is not bound by subsequent admissions of contractor: *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 96 Pac. Rep. 158, 160, 97 Pac. Rep. 464.

⁸ **California.** *Hubbard v. Lee*, 6 Cal. App. 602, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

⁹ **Utah.** Admission by contractor that materials furnished by his subcontractor in compliance with subcontract supports finding: *Mudgley v. Campbell B. Co.* (Utah), 112 Pac. Rep. 820.

Washington. See *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

¹⁰ **Washington.** Stipulation for fixing attorneys' fees without introduction of evidence: See *Housekeeper v. Livingstone*, 48 Wash. 209, 93 Pac. Rep. 217, 218.

¹¹ **California.** *Patten & Davies L. Co. v. Gibson*, 9 Cal. App. 23, 25, 98 Pac. Rep. 37, 38.

¹² **Kansas.** Admissibility of original or certified record of survey, provided for by statute: See *Dent v. Simpson*, 81 Kan. 217, 105 Pac. Rep. 542.

Montana. Evidence of survey, and boundary lines: See *Hamilton v. Modidah Trust*, 39 Mont. 269, 102 Pac. Rep. 335. See s. c., *Hamilton v. Murray*, 29 Mont. 80, 74 Pac. Rep. 75.

¹³ **Utah.** Extent of land for conveniences and occupation a question of fact: *Park City M. Co. v. Comstock S. M. Co.* (Utah), 103 Pac. Rep. 254, 259.

See § 827, this Supplement, post.

§ 770. **Books of account.** Claimants cannot change original entries in their books of account to the detriment of third persons.¹⁴ Ledger made up from previous entries is not a book of original entries.¹⁵ And where the witness has not made the entries, they cannot be read in evidence.¹⁶

Additional matter to foot-note 15.¹⁷

§ 771. **Claimant as witness against estate.**

§ 772. **Fixtures. Intention of parties.**

Additional matter to foot-note 17.¹⁸

§ 773. **Judicial notice.** Courts will take judicial notice of city charters which are state laws;¹⁹ and of the streets and their boundaries and their relations to each other in cities;²⁰ and of the line of a railroad operated partly in the state and

¹⁴ **California.** Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 495, 99 Pac. Rep. 856, 863, 111 Pac. Rep. 760; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

Utah. Belknap v. Condon, 34 Utah 213, 97 Pac. Rep. 111, 115.

¹⁵ **California.** San Francisco T. Co. v. Gray, 11 Cal. App. 314, 104 Pac. Rep. 999.

¹⁶ **Idaho.** Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24.

Oregon. Laughlin v. Connors, 54 Oreg. 184, 102 Pac. Rep. 793.

Idaho. Entries in books as evidence of delivery of material: See Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24, 26.

¹⁷ **Colorado.** Books as evidence for the purpose of identifying materials as furnished for a particular job and to a particular person: See Rice v. Rhone (Colo.), 111 Pac. Rep. 585.

Oregon. Absence of books of account, even though claimant ignorant, when materials supplied to different properties; effect: Laughlin v. Connors, 54 Oreg. 184, 102 Pac. Rep. 793.

Washington. Books of original entries kept by contractors in ordinary course of business are competent to show that the materials were ordered and received, although general manager as witness has no personal knowledge of transaction: Cascade L. Co. v. Aetna I. Co., 56 Wash. 503, 106 Pac. Rep. 158; Minneapolis S. & M. Co. v. Aetna I. Co., 56 Wash. 699, 106 Pac. Rep. 160.

¹⁸ **Washington.** See American R. Co. v. Pendleton (Wash.), 112 Pac. Rep. 1117.

See §§ 95 and 185, et seq., Treatise and this Supplement, ante.

¹⁹ **California.** Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. Rep. 692, 694.

Oregon. Naylor v. McColloch, 54 Oreg. 459, 103 Pac. Rep. 68.

²⁰ **California.** Pacific Paving Co. v. Verso, 12 Cal. App. 362, 107 Pac. Rep. 590.

partly out of it;²¹ courts will also take judicial notice of the succession of holidays declared by the governor of the state following the earthquake and conflagration of April 18, 1906.²²

But Courts will not generally take judicial notice of municipal ordinances,²³ nor of building ordinances;²⁴ nor of the manner of construction of buildings in a particular county, nor the purposes for which they are used;²⁵ nor of the records of other cases pending or tried before it.²⁶

Additional matter to foot-note 22.²⁷

§ 774. Parol evidence. Assignment.

Additional matter to foot-note 23.²⁸

§ 775. Same. Parol evidence to explain meaning of words.

§ 776. Notice. Probate proceedings.

Additional matter to foot-note 26.²⁹

§ 777. Questions assuming matter in dispute.³⁰

§ 778. Receipt.³¹

Additional matter to foot-note 28.³²

²¹ **Kansas.** Peterson v. Missouri Pac. Ry. Co., 77 Kan. 226, 94 Pac. Rep. 138, 140.

²² **California.** Pohelm v. Meyers, 9 Cal. App. 31, 98 Pac. Rep. 66, 67.

²³ **California.** Metteer v. Smith, 156 Cal. 572, 105 Pac. Rep. 735, 736.

²⁴ **California.** May v. Craig, 13 Cal. App. 368, 109 Pac. Rep. 842.

²⁵ **California.** Hohn v. Pauly, 11 Cal. App. 724, 106 Pac. Rep. 266, 269.

²⁶ **Washington.** Pacific I. & S. Works v. Goerlig, 55 Wash. 149, 104 Pac. Rep. 151; Lowndale v. Gray's Harbor B. Co. (Wash.), 103 Pac. Rep. 833.

²⁷ See § 374, Treatise.

²⁸ **Oregon.** See Alderson v. Lee, 52 Oreg. 92, 96 Pac. Rep. 234, 237.

²⁹ **Washington.** Constructive notice; general principles: See Hawkes v. Hoffman, 56 Wash. 120, 105 Pac. Rep. 156, 158.

³⁰ See § 828, this Supplement, post.

³¹ **New Mexico.** Receipts received for expenditures are not the best evidence that the articles for which they were supposed to represent payment were used in the construction of that particular building; but they are competent in connection with testimony as to their contents, and not as a substitute for the testimony of the witness.

New Mexico. Neher v. Viviani (N. M.), 110 Pac. Rep. 695, 698.

³² **California.** San Pedro L. Co. v. Schroeter, 156 Cal. 158, 161, 103 Pac. Rep. 888.

§ 779. Agency. The testimony of an agent sworn as a witness in a case when the question of his agency is involved is competent to establish it and its extent and maker, as any other witness; but the extrajudicial statements or declarations in pais of one assuming to act as agent are inadmissible and incompetent to establish the fact of agency.³³

Additional matter to foot-note 30.³⁴

Additional matter to foot-note 31.³⁵

§ 780. Same. Special statutory provision. Presumption.
Additional matter to foot-note 32.³⁶

§ 781. Same. Overcoming presumption. Knowledge.
Additional matter to foot-note 36.³⁷

§ 782. Same. Knowledge of lack of agency.³⁸

§ 783. Same. Knowledge that employer incurred indebtedness on his own account.³⁹

§ 784. Same. Proof of knowledge of owner.
Additional matter to foot-note 40.⁴⁰

Colorado. Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 35.

Washington. Effective receipt: Pacific L. & T. Co. v. Dailey (Wash.), 111 Pac. Rep. 869, 870.

33 California. Kast v. Miller & Lux (Cal. Sup.), 115 Pac. Rep. 932, and cases cited.

34 Person erecting as agent for undisclosed principal:

California. See Barrett-Hicks Co. v. Glas, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

Oregon. Peck v. Voget (Oreg.), 108 Pac. Rep. 120.

Kansas. Evidence of wife as agent of husband: See Hayes v. Funk, 79 Kan. 416, 99 Pac. Rep. 1131.

35 California. Kast v. Miller & Lux (Cal. Sup.), 115 Pac. Rep. 932.

Oregon. Acts and declarations of president of corporation acting outside of duties and authorities not competent evidence against it: See Harding v. Oregon-Idaho Co. (Oreg.), 110 Pac. Rep. 412, 415.

36 Idaho. See Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24, 27.

37 Idaho. Husband improving separate property of wife without her consent: See Larson v. Carter, 14 Idaho 511, 94 Pac. Rep. 825, 827.

38 See "Agency," §§ 572 et seq., this Supplement, ante.

39 See §§ 572 et seq., and §§ 469 et seq., ante.

40 Utah. Parol agreement, outside of contract of sale, authorizing Bloom's Sup.—17

§ 785. **Burden of proof.** The plaintiff need not prove non-payment, but the burden of proving payment rests on the defendant.⁴¹ The burden of proof of the right to make application of payments is on the claimant and not on the owner.⁴² The burden of showing that damages under a contract are liquidated damages is upon the party endeavoring to avail himself of the provision.⁴³ The burden of proving the waiver of the lien is upon the party asserting it.⁴⁴

Additional matter to foot-note 42.⁴⁵

§ 786. **Same. Priorities.**⁴⁶

§ 787. **Same. Time of filing claim of lien.**⁴⁷ The burden is on the claimant to prove that he filed his claim of lien or statement within the prescribed statutory period.⁴⁸

Additional matter to foot-note 47.⁴⁹

Improvement: See *Belknap v. Condon*, 34 Utah 213, 97 Pac. Rep. 111, 114.

⁴¹ **California.** *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

⁴² **Montana.** *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 672 (application to items of extra work).

⁴³ **California.** *Sherman v. Gray*, 11 Cal. App. 348, 104 Pac. Rep. 1004.

⁴⁴ **Washington.** *Pacific L. & T. Co. v. Dalley* (Wash.), 111 Pac. Rep. 869, 870.

⁴⁵ **California.** The burden of proof of co-partner surety on contractor's bond acted with authority of co-partner is on owner: *Burnett v. Glas*, 154 Cal. 249, 256, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856.

⁴⁶ See *Priorities*, §§ 486 et seq., this Supplement, ante.

⁴⁷ Strike out, in the fourth line of the section, the words "completion of the building" and insert "the filing of his claim of lien was."

⁴⁸ **Colorado.** *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

⁴⁹ **Washington.** *Pacific L. & T. Co. v. Dalley* (Wash.), 111 Pac. Rep. 869, 870.

⁴⁹ **Idaho.** See *Valley L. Co. v. Driessel*, 13 Idaho 662, 93 Pac. Rep. 765, 771.

Oregon. The burden of proof is on the principal contractor—to prove substantial compliance with the contract or with the contract as modified by the parties from time to time, or that the owner waived compliance: *Adams v. Mackenzie* (Oreg.), 114 Pac. Rep. 460.

Burden on claimant to show no unnecessary or unreasonable delay in performance to postpone period for filing claim: See *Coffey v. Smith*, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

§ 788. **Same. Cessation from work.**
Additional matter to foot-note 48.⁵⁰

§ 789. **Certificate as evidence.**
Additional matter to foot-note 49.⁵¹
Additional matter to foot-note 50.⁵²

§ 790. **Same. Conclusiveness of certificate.**
Additional matter to foot-note 52.⁵³

§ 791. **Same. Certificate as evidence of time of completion of building.**⁵⁴

§ 792. **Completion of building.**⁵⁵

§ 793. **Same. Statutory evidence.**⁵⁶

§ 794. **Non-completion of building.**

⁵⁰ **California.** Testimony regarding amount and value of work done up to time of abandonment; evidence in rebuttal: See *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 144, 97 Pac. Rep. 155.

Burden on owner to show affirmatively that holidays extended his time to post notice of non-responsibility and that such notice was given within the statutory time: *John R. Gentle & Co. v. Britton*, 158 Cal. 328, 330, 111 Pac. Rep. 9.

Idaho. Burden on owner to show material-men had knowledge of existence of more than one original contract: See *Valley L. Co. v. Driessel*, 13 Idaho 662, 93 Pac. Rep. 765, 771.

⁵¹ **Washington.** Certificate to prove damage to owner as against surety on contractor's bond: See *Lazelle v. Empire State S. Co.*, 58 Wash. 589, 109 Pac. Rep. 195, 197.

⁵² See *City S. I. Co. v. Marysville*, 155 Cal. 419, 428, 101 Pac. Rep. 308.

⁵³ **California.** As to performance of work: See *City S. I. Co. v. Marysville*, 155 Cal. 419, 428, 431, 432, 101 Pac. Rep. 308.

Oregon. But a certificate as to estimates of amount of work done is not conclusive in the absence of a provision in the contract making it conclusive: *Williams v. Mount Hood Ry. & T. Co. (Oreg.)*, 110 Pac. Rep. 490, 492, 111 Pac. Rep. 17.

Washington. Conclusive as to cost of completion upon abandonment: *Lazelle v. Empire State S. Co.*, 58 Wash. 589, 109 Pac. Rep. 195, 197.

As to estimates: See *McKibor v. Savage (Wash.)*, 110 Pac. Rep. 811, 812.

⁵⁴ See "Certificates," §§ 239 et seq., and §§ 789 et seq., this Supplement, ante.

⁵⁵ See "Performance," §§ 334 et seq., this Supplement, ante.

⁵⁶ See §§ 416 et seq., §§ 350 et seq., this Supplement, ante.

§ 795. Claim of lien. As evidence of lien. The introduction of the claim of lien in evidence is not to prove its contents, but to establish that notice has been given as required by law. It is entitled to admission when it is shown that it complies with the statutory requirements. If the signature and verification are sufficient to entitle it to be filed with the recorder and it was so filed, it becomes a public record, and thereafter may be received in evidence under the rules governing the admission of public recorded writings. No proof of the genuineness of the signatures to either the claim or the verification is a necessary preliminary to the admission in evidence of a claim of lien properly verified and filed for record.⁵⁷

Additional matter to foot-note 65.⁵⁸

Additional matter to foot-note 66.⁵⁹

§ 796. Same. Objections to contents of claim. If the issue is raised that the description of the property in the claim of lien is not sufficient for identification, the claimant may introduce evidence in support of the sufficiency of the description.⁶⁰ When objection is made that sufficient foundation has not been laid for the introduction of the recorded claim of lien, the particulars wherein the foundation is not sufficient should be specified.⁶¹ The terms of his subcontract, if controverted, must be proved by the subclaimant substantially as set out in his claim of lien.⁶²

⁵⁷ *California*. *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476.

⁵⁸ *Nevada*. *Omissions of essentials in claim* can not be aided by averment in complaint or extrinsic evidence. *Porteous D. Co. v. Fee*, 29 Nev. 375, 91 Pac. Rep. 135, 136.

⁵⁹ *Alaska*. *Pioneer M. Co. v. Delamotte (C. C. A.)*, 185 Fed. Rep. 752, 755.

Claim not competent to prove that work is done or that it is done under terms and conditions alleged therein or alleged in the complaint: Pioneer M. Co. v. Delamotte, supra.

California. *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476.

⁶⁰ *California*. *Patten & Davies L. Co. v. Gibson*, 9 Cal. App. 23, 25, 98 Pac. Rep. 37, 38.

⁶¹ *California*. *D. I. Nofziger L. Co. v. Solomon*, 13 Cal. App. 621, 110 Pac. Rep. 474, 476.

⁶² *California*. *Lucas v. Rea*, 10 Cal. App. 641, 645, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

Additional matter to foot-note 68.⁶³

Additional matter to foot-note 71.⁶⁴

Additional matter to foot-note 72.⁶⁵

§ 797. Extra work.

Additional matter to foot-note 73.⁶⁶

§ 798. Valid contract.

Additional matter to foot-note 76.⁶⁷

§ 799. Same. Parol modifications of written contract. A custom to do work in a particular way, if relevant under any circumstances, cannot prevail as against a contrary provision of the contract.⁶⁸ If there is no objection to evidence admitted showing the modification of the original contract by parol and the trial court's attention is not properly called thereto, the objection is waived.⁶⁹

Additional matter to foot-note 77.⁷⁰

⁶³ **Kansas.** Dealing with lien statement as if in evidence, omission to formally introduce it is not prejudicial. *Home L. & S. Co. v. School Dist.* (Kan.), 115 Pac. Rep. 590.

Washington. Objections to the sufficiency of lien notice must be raised at the time when it is offered in evidence: *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

⁶⁴ **Washington.** Compare *Wetzler v. Nichols*, 53 Wash. 285, 101 Pac. Rep. 867, 868.

⁶⁵ **Idaho.** Certain evidence as to extra work examined: See *Rathbun v. State*, 15 Idaho 273, 97 Pac. Rep. 335, 337.

Montana. Presumption that there were no extras, in absence of writing required by contract: *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 671.

Evidence inadmissible to prove extra work or agreement for extra work in absence of writing required by contract or issue proved that contract was modified or this provision waived: See *Piper v. Murray*, *supra*.

⁶⁶ **Idaho.** Compare *Sanders v. Keller* (Idaho), 111 Pac. Rep. 350, 352. See § 766, this Supplement, *ante*.

⁶⁷ **California.** See *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892.

⁶⁸ **California.** *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 143, 97 Pac. Rep. 155. See *Puritas L. Co. v. Greene* (Cal. App.), 115 Pac. Rep. 660.

⁶⁹ **California.** *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 42, 106 Pac. Rep. 413.

⁷⁰ **Oregon.** Where subsequent modification of contract is not pleaded evidence can not be offered to prove it; likewise with reference to waiver of performance.

§ 800. Same. Contract admissible to show character of building.⁷¹

§ 801. Same. Contract as evidence with reference to time of performance of labor.

§ 802. Inadmissibility of indefinite contract.⁷²

§ 803. Parol evidence in aid of false reference. No oral evidence can be received to show that plans and specifications were intended by the parties to form a part of their statutory original contract.⁷³

Additional matter to foot-note 82.⁷⁴

§ 804. Parol evidence not admissible for construction of contract.⁷⁵

Additional matter to foot-note 84.⁷⁶

§ 805. Same. Rule not applicable to mere memorandum. Additional matter to foot-note 85.⁷⁷

⁷¹ See §§ 792 et seq., and §§ 315 et seq., this Supplement, ante.

⁷² See § 208, this Supplement, ante.

⁷³ *California*. *Hartwell v. Ganahl L. Co.*, 8 Cal. App. 733, 736, 97 Pac. Rep. 901.

⁷⁴ *Washington*. See *Dickerman v. Reeder* (Wash.), 109 Pac. Rep. 1060.

⁷⁵ *As to lines of grading*: See *Hill v. Clark*, 7 Cal. App. 609, 612, 95 Pac. Rep. 382.

⁷⁶ *Kansas*. Evidence of contents admitted on cross-examination after being ruled out on direct examination, re-examination not prejudicial. See *St. Louis and S. F. R. Co. v. Gaba*, 78 Kan. 432, 97 Pac. Rep. 435.

Montana. See *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 672.

General rule as to inadmissibility of parol evidence:

Oklahoma. *Standard L. Co. v. Miller & Vidor L. Co.*, 21 Okl. 617, 96 Pac. Rep. 761, 764.

Oregon. *Holland v. Rhoades* (Oreg.), 106 Pac. Rep. 779.

South Dakota. *Strunk v. Smith*, 8 So. Dak. 407, 66 N. W. Rep. 926.

Utah. *Midgley v. Campbell B. Co.* (Utah), 112 Pac. Rep. 820.

Washington. *Driver v. Galland* (Wash.), 109 Pac. Rep. 593, 594; *Tobin v. McArthur*, 56 Wash. 523, 106 Pac. Rep. 180.

General rule applied to lease with reference to duty to make repairs: *Hockersmith v. Ferguson* (Wash.), 116 Pac. Rep. 11.

⁷⁷ *Oregon*. Compare *Williams v. Mount Hood Ry. & P. Co.* (Oreg.), 110 Pac. Rep. 490, 111 Pac. Rep. 17.

Washington. But see *Goss v. Northern Pac. H. Assoc. of Tacoma*, 50 Wash. 236, 96 Pac. Rep. 1078.

§ 806. Same. Performance of contract.

Additional matter to foot-note 86.⁷⁸

§ 807. Void original contract admissible for what purpose.⁷⁹**§ 808. Same. Invalidity, how shown.**

Additional matter to foot-note 88.⁸⁰

§ 809. Malperformance of work. The question of whether taking bricks out of the foot of a wall would weaken the same is not the subject of expert evidence, and is properly excluded as calling for opinion evidence not expert, and for matters of common observation.⁸¹

Additional matter to foot-note 90.⁸²

§ 810. Liquidated damages.

Additional matter to foot-note 91.⁸³

§ 811. Damages. Circumstances surrounding execution of contract. Defendant in default.

Additional matter to foot-note 92.⁸⁴

⁷⁸ **Expert evidence:** See § 809 of Treatise.

⁷⁹ See §§ 319 et seq., Supplement, ante.

⁸⁰ **California.** Lucas v. Rea, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

⁸¹ **California.** Hedstrom v. Union Trust Co., 7 Cal. App. 278, 287, 94 Pac. Rep. 386.

⁸² **California.** Expert evidence as to amount of work done: See C. Scheerer & Co. v. Deming, 154 Cal. 137, 143, 97 Pac. Rep. 155.

See § 806 of Treatise.

Montana. Expert can not substitute his judgment in place of that of the architect or jury as to whether a claimant was entitled to a certificate for final payment: Piper v. Murray (Mont.), 115 Pac. Rep. 669, 673. See this case generally as to expert evidence.

Oklahoma. As to expert evidence: See Yates v. Garrett, 19 Okl. 449, 92 Pac. Rep. 142.

Oregon. Contractors and builders as experts on falling building from lack of lateral support, and what is necessary to be done and is usual under such circumstances: See Weiss v. Kohlhagen (Oreg.), 113 Pac. Rep. 46, 50.

⁸³ **California.** Evidence as to liquidated damages: See Hill v. Clark, 7 Cal. App. 609, 612, 95 Pac. Rep. 382; Sherman v. Gray, 11 Cal. App. 348, 104 Pac. Rep. 1004.

⁸⁴ **California.** Damages by explosion: See Higgins v. Los Angeles

§ 812. Presumption of knowledge by subclaimants of valid contract.⁸⁵

§ 813. Evidence of benefit conferred.

Additional matter to foot-note 95.⁸⁶

§ 814. Acceptance of performance. Where the complaint states a good cause of action in *indebitatus assumpsit*, or on a common count, it is immaterial whether the work which the contractor did for the owner was not performed in time under the contract, or under a modification of it, if the owner accepts the work; and evidence showing that the work was done in the completion of the structure is admissible.⁸⁷

Additional matter to foot-note 96.⁸⁸

§ 815. Evidence of liability in case of failure to perform, or abandonment.⁸⁹

§ 816. Estoppel as evidence. General rule.

Additional matter to foot-note 99.⁹⁰

G. & E. Co. (Cal. Sup.), 115 Pac. Rep. 313; *Linforth v. San Francisco G. & E. Co.*, 156 Cal. 58, 63, 103 Pac. Rep. 320.

Damages for breach of contract to deliver materials: See *Fairchild-Gilmore-Wilton Co. v. Southern R. Co.*, 158 Cal. 264, 110 Pac. Rep. 951, 954.

Kansas. Damages: See *Fredonia G. Co. v. Bailey*, 77 Kan. 296, 94 Pac. Rep. 258.

Washington. Damages for delay; presumption: See *Goss v. Northern Pac. H. Assoc. of Tacoma*, 50 Wash. 236, 96 Pac. Rep. 1078.

⁸⁵ See §§ 315 et seq., this Supplement, ante.

⁸⁶ *California*. See *Boyd v. Bargagliotti*, 12 Cal. App. 228, 237, 107 Pac. Rep. 150.

⁸⁷ *California*. *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 35, 41, 106 Pac. Rep. 413.

⁸⁸ *Utah*. See *Ryan v. Curlew L. & R. Co. (Utah)*, 104 Pac. Rep. 218, 220.

⁸⁹ See §§ 586 et seq., this Supplement, ante.

⁹⁰ *California*. **Estoppel by inducing material-men to deliver subsequent lots of material, relying upon former accounts rendered, retained and acquiesced in:** See *Stimson M. Co. v. Hughes Mfg. Co.*, 5 Cal. App. 559, 97 Pac. Rep. 322, 333.

Oklahoma. Estoppel as to location of plant by designation of place: See *Minnetonka O. Co. v. Cleveland V. B. Co. (Okl.)*, 111 Pac. Rep. 326.

Oregon. As to waiver of performance: See *Williams v. Mt. Hood Ry. and P. Co. (Oreg.)*, 111 Pac. Rep. 17, 110 Pac. Rep. 490.

Additional matter to foot-note 100.⁹¹

§ 817. **Same. Judgment.**⁹²

§ 818. **Same. Owner estopped.** Where the owner does not file a notice of completion of the building or cessation of work, as required by the statute, evidence that the owner stated that the building was not completed nor accepted, made to the plaintiff and acted upon by him, is competent for the purpose of proving or tending to prove the fact as to when the building was completed, and also for the purpose of proving that the owner is estopped from claiming that the claim of lien was not filed in time.⁹³

Additional matter to foot-note 104.⁹⁴

§ 819. **Same. Owner estopped by acts of reputed owner.**⁹⁵

§ 820. **Same. Surety not estopped to foreclose lien.**

Additional matter to foot-note 108.⁹⁶

§ 821. **Same. Estoppel of contractors on bond.**

Additional matter to foot-note 109.⁹⁷

Washington. Waiver of lien: See *Pacific L. & T. Co. v. Dalley* (Wash.), 111 Pac. Rep. 869, 870.

⁹¹ **California.** *Hubbard v. Lee*, 6 Cal. App. 602, 609, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528. *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. Rep. 723.

Colorado. *Gillett v. Young*, 45 Colo. 562, 101 Pac. Rep. 766, 768.

⁹² See § 904, this Supplement, post.

⁹³ **California.** *Hubbard v. Lee*, 6 Cal. App. 602, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528.

⁹⁴ **California.** State estopped to urge that contractor has not performed contract when there is no fraud on his part operating to prevent discovery of defects: See *City S. I. Co. v. Marysville*, 155 Cal. 419, 428, 101 Pac. Rep. 308.

Colorado. Owner estopped to set up claim for damages: See *Gillett v. Young*, 45 Colo. 562, 101 Pac. Rep. 766, 768.

Washington. Estoppel as to street grading, even though ordinance did not authorize the same: See *Ettor v. City of Tacoma*, 57 Wash. 50, 107 Pac. Rep. 1061.

⁹⁵ See §§ 469 et seq., this Supplement, ante.

⁹⁶ See §§ 619 and 620, this Supplement, ante.

California. See particularly *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

⁹⁷ **Washington.** Contractor and surety estopped to raise question of

§ 822. Forfeiture and fraud.⁹⁸

§ 823. Same. Rescission as evidence of fraud.⁹⁹

§ 824. Same. Fraudulent representations.

§ 825. Use of materials in building.

Additional matter to foot-note 117.¹⁰⁰

Additional matter to foot-note 118.¹⁰¹

Additional matter to foot-note 119.¹⁰²

§ 826. Money advanced.

ultra vires: See *City of Spokane v. Costello*, 57 Wash. 183, 106 Pac. Rep. 764, 766.

⁹⁸ See, generally, "Forfeiture of lien," §§ 627 et seq., and § 207, this Supplement, ante.

⁹⁹ See §§ 326 et seq., this Supplement, ante.

¹⁰⁰ *Montana*. Heresay evidence as to quality of material: See *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 673.

¹⁰¹ *Colorado*. Evidence of delivery and use held sufficient: See *Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573.

Idaho. Entries in books competent to prove delivery of material: See *Valley L. and Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 26.

Kansas. Evidence of use of materials in building proof that they were furnished to be used and unless shown that they were intended for another purpose it will be presumed that they had been contracted for to be used in the building: *Smith v. Chicago L. & C. Co.* (Kan.), 114 Pac. Rep. 372, 373, 374; *Deatherage v. Henderson*, 43 Kan. 684, 688, 23 Pac. Rep. 1052, 1053.

New Mexico. See *Stearns-Roger Mfg. Co. v. Aztec M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710; receipt as evidence of use of material: See *Neher v. Viviani* (N. M.), 110 Pac. Rep. 695, 698. See § 778 this Supplement, ante.

Washington. Evidence as to use of materials: See *Little Bros. M. Co. v. Baker*, 57 Wash. 311, 106 Pac. Rep. 910.

Kansas. Proof of delivery: See *National S. Co. v. Wyandotte C. & L. Co.*, 76 Kan. 914, 92 Pac. Rep. 1111, 1113; s. c., sub nom. *Atkin v. Wyandotte C. & L. Co.*, 73 Kan. 768, 84 Pac. Rep. 1040, quoting *Rice v. Hodge*, 26 Kan. 170.

Oregon. Evidence of delivery of electricity: *Grants Pass B. & T. Co. v. Enterprise M. Co.* (Oreg.), 113 Pac. Rep. 859.

Washington. Evidence of delivery: See *Little Bros. M. Co. v. Baker*, 57 Wash. 311, 106 Pac. Rep. —, quoting *Rice v. Hodge*, 26 Kan. 164.

¹⁰² *Colorado*. As to necessity of showing what portion of materials furnished to subcontractor acting under several different original contractors: See *Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 573.

§ 827. **Questions of fact.** The following are questions of fact: Performance of contract;¹⁰³ knowledge of or consent to assignment;¹⁰⁴ and amount of land necessary for convenient use and occupation of the structure.¹⁰⁵ Where there is a conflict in the evidence as to the time of performance or completion of the contract, and no time for performance is stated in the contract, it is a question of fact whether or not the building was completed within a reasonable time;¹⁰⁶ and likewise whether notice has been given to a surety within a reasonable time is a question of fact.¹⁰⁷

Additional matter to foot-note 131.¹⁰⁸

§ 828. **Questions of law.** Whether an amount is due and owing,¹⁰⁹ and "payable,"¹¹⁰ or whether liens were "valid,"¹¹¹ or whether a building was an unlawful structure,¹¹² is a conclusion of law. Where there is no dispute as to the time of performance and no time is specified in the contract, it is a question of law for the court as to whether the contract was performed within a reasonable time.¹¹³

¹⁰³ **Colorado.** Idaho G. C. M. & M. Co. v. Colorado I. W. Co. (Colo.), 111 Pac. Rep. 553, 555.

Oregon. Coffey v. Smith, 52 Oreg. 538, 97 Pac. Rep. 1079; s. c., 52 Oreg. 545, 97 Pac. Rep. 1081; s. c., 52 Oreg. 546, 97 Pac. Rep. 1082.

¹⁰⁴ **Washington.** Strandell v. Moran, 49 Wash. 533, 95 Pac. Rep. 1106.

¹⁰⁵ **Utah.** Park City M. Co. v. Comstock S. M. Co. (Utah), 101 Pac. Rep. 254, 259.

¹⁰⁶ **New Mexico.** Neher v. Viviani (N. M.), 110 Pac. Rep. 695, 697; Cowles v. Hagerman (N. M.), 110 Pac. Rep. 843, 844; s. c., sub nom. Hagerman v. Cowles, 14 N. M. 422, 94 Pac. Rep. 946, but see § 828, this Supplement, post.

¹⁰⁷ **California.** Bacigalupi v. Phoenix B. & C. Co. (Cal. App.), 112 Pac. Rep. 892, 895.

¹⁰⁸ **California.** Hill v. Clark, 7 Cal. App. 609, 611, 95 Pac. Rep. 382.

Montana. Piper v. Murray (Mont.), 115 Pac. Rep. 669, 672.

Oregon. Edmunds v. Welling (Oreg.), 110 Pac. Rep. 533.

¹⁰⁹ **California.** Burke v. Dittus, 8 Cal. App. 175, 178, 96 Pac. Rep. 330; Beck v. Schmidt, 13 Cal. App. 448, 110 Pac. Rep. 455, 457; Irwin v. Insurance Co. of N. A. (Cal. App.), 116 Pac. Rep. 294.

Utah. Chesney v. Chesney, 33 Utah 503, 94 Pac. Rep. 989.

¹¹⁰ **California.** Irwin v. Insurance Co. of N. A. (Cal. App.), 116 Pac. Rep. 294.

¹¹¹ **Oregon.** Equitable S. & L. Assoc. v. Hewitt (Oreg.), 106 Pac. Rep. 447, 450.

¹¹² **Oregon.** Morton v. Wessinger (Oreg.), 113 Pac. Rep. 7.

¹¹³ **New Mexico.** Neher v. Viviani (N. M.), 110 Pac. Rep. 695, 697; Cowles v. Hagerman (N. M.), 110 Pac. Rep. 843-844; s. c., sub nom. Hagerman v. Cowles, 14 N. M. 422, 94 Pac. Rep. 946.

It cannot be said as a matter of law that the completion of a contract to do the plumbing in a house in the course of construction is a completion of the building.¹¹⁴ The construction of a written building contract is for the court and not for the jury;¹¹⁵ and the sufficiency of the consideration under an oral contract is for the determination of the court.¹¹⁶

Additional matter to foot-note 134.¹¹⁷

§ 829. Value. Valid contract as evidence thereof. Action on implied contract. Where the claimant offers to prove the contract and the furnishing of the materials thereunder, in the absence of any objection this seems to include proof of the value of the materials as specified in the contract.¹¹⁸

Additional matter to foot-note 140.¹¹⁹

§ 830. Same. Common counts.

Additional matter to foot-note 141.¹²⁰

§ 831. Same. Contract as evidence of extra work. Express contract.

Additional matter to foot-note 142.¹²¹

¹¹⁴ *Oregon*. Coffey v. Smith, 52 *Oreg.* 538, 97 *Pac. Rep.* 1079; s. c., 52 *Oreg.* 545, 97 *Pac. Rep.* 1081; s. c., 52 *Oreg.* 546, 97 *Pac. Rep.* 1082.

¹¹⁵ *New Mexico*. Neher v. Viviani (N. M.), 110 *Pac. Rep.* 695, 698.

¹¹⁶ *Washington*. Evans v. Oregon & W. R. Co., 58 *Wash.* 429, 108 *Pac. Rep.* 1095, 1097.

¹¹⁷ *California*. Whether causes of delay extending time to complete contract not a question of law unless so provided in the contract: See *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 *Cal. App.* 37, 42, 106 *Pac. Rep.* 413.

¹¹⁸ *California*. D. I. Nofziger L. Co. v. Solomon, 13 *Cal. App.* 621, 110 *Pac. Rep.* 474, 477.

¹¹⁹ *California*. See *Fairchild-Gilmore-Wilton Co.*, 158 *Cal.* 264, 110 *Pac. Rep.* 951, 954; *Barrett-Hicks Co. v. Glas* (*Cal. App.*), 111 *Pac. Rep.* 760, 764; s. c., 9 *Cal. App.* 491, 99 *Pac. Rep.* 856; s. c., sub nom. *Burnett v. Glas*, 154 *Cal.* 249, 97 *Pac. Rep.* 423.

¹²⁰ *Washington*. See *Home v. Chicago M. & P. S. Ry. Co.* (*Wash.*), 109 *Pac. Rep.* 799.

¹²¹ *California*. *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 *Cal. App.* 37, 42, 106 *Pac. Rep.* 413. See *Barrett-Hicks Co. v. Glas* (*Cal. App.*), 111 *Pac. Rep.* 760, 764; s. c., 9 *Cal. App.* 491, 99 *Pac. Rep.* 856; s. c., sub nom. *Burnett v. Glas*, 154 *Cal.* 249, 97 *Pac. Rep.* 423.

Utah. Foulger v. McGrath, 34 *Utah* 86, 95 *Pac. Rep.* 1004, 1007.

¹²¹ See § 797, this Supplement, ante.

§ 832. Same. Void contract.

Additional matter to foot-note 143.¹²²

§ 833. Same. Market price. Usual price.

Additional matter to foot-note 149.¹²³

§ 834. Same. Other evidence of value. In an action against the original contractor and his surety for breach of contract upon abandonment, the actual cost of completion is some evidence of the value or reasonable cost, where the owner receives bids for completing the work and gives the contract to the lowest bidder.¹²⁴

Additional matter to foot-note 153.¹²⁵

¹²² **California.** Coghlan v. Quartararo (Cal. App.), 115 Pac. Rep. 664, 666.

The statutory original contract was abolished by Stats. & Amdts. 1911, pp. 1313 et seq.

¹²³ **California.** "Price" as indicating money or some other equivalent: See Kinard v. Jordan, 10 Cal. App. 219, 101 Pac. Rep. 696, 698.

¹²⁴ **California.** Bacigalupi v. Phoenix B. & C. Co. (Cal. App.), 112 Pac. Rep. 892.

¹²⁵ **California.** Evidence held sufficient shows the competency of builder to give opinion as to cost of repairing building: Higgins v. Los Angeles G. & E. Co. (Cal. Sup.), 115 Pac. Rep. 313.

Idaho. Owner of personal property qualified to state value: See Rankin v. Caldwell, 15 Idaho 626, 99 Pac. Rep. 108.

Oregon. Brown v. Truax (Oreg.), 115 Pac. Rep. 597, 599.

CHAPTER XXXIX.

VARIANCES.

§ 835. Variances. Generally.

Additional matter to foot-note 1.¹

§ 836. Claim of lien. Pleadings. Proof. Generally.

Additional matter to foot-note 6.²

Additional matter to foot-note 7.³

Additional matter to foot-note 8.⁴

§ 837. Claim of lien. Pleadings. Material variances.⁵

§ 838. Same. Persons contracting. Husband and wife.⁶

§ 839. Same. Immaterial variances. Where the claim of lien sets forth that the name of the owner and reputed owner of the building is a certain person and the complaint alleges that the material was furnished to said persons and other persons, owners of the property, and the answer does not deny the allegation of the complaint in reference to the ownership it is not a variance.⁷

¹ Amendment of claim of lien by statutory permission, see § 415, this Supplement, ante.

² Oregon. Departure in pleadings: See Pioneer H. Co. v. Farrin (Oreg.), 107 Pac. Rep. 456.

³ California. Lucas v. Gobbi, 10 Cal. App. 648, 651, 103 Pac. Rep. 157.

⁴ Express contract and implied promise: See Lacy Mfg. Co. v. Los Angeles G. & E. Co., 12 Cal. App. 37, 41, 106 Pac. Rep. 413.

⁵ California. Separate contract for indemnity not part of contract of contractor: See Barrett-Hicks Co. v. Glas (Cal. App.), 111 Pac. Rep. 760, 765; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

⁶ Montana. Joint contract alleged and evidence showing separate contract; no failure of proof: Logan v. Billings & N. R. Co., 40 Mont. 467, 107 Pac. Rep. 415.

⁷ See "Claim of lien," generally, §§ 370 et seq., this Supplement, ante.

⁸ See § 849, this Supplement, post.

⁹ California. Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

§ 840. **Same. Valid, void contract. Owner purchasing directly.**⁸

§ 841. **Same. Description of property.**⁹

§ 842. **Same. Payments.**

Additional matter to foot-note 17.¹⁰

§ 843. **Claim of lien and proof. Generally.** The test as to the sufficiency of the claim of lien with respect to the terms and conditions of the contract is whether such notice so far departs from the terms and conditions of the contract as to render it misleading to the injury of the owner. If it does, the variance is fatal. If, however, there is a substantial agreement between the contract and claim, so that there can not arise in the mind of the owner any misapprehension as to the extent and nature of the lienor's claim, then any technical variance which may appear will be immaterial.¹¹

§ 844. **Same. Material variances.**

Additional matter to foot-note 20.¹²

§ 845. **Same. Time of payment.**

Additional matter to foot-note 26.¹³

§ 846. **Same. Nature of labor.**

Additional matter to foot-note 27.¹⁴

⁸ **California.** The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

⁹ See "Description," §§ 399 et seq., this Supplement, ante.

¹⁰ **California.** **Terms of payment** as stated in contract and claim of lien; held no variance: See *Otis E. Co. v. Brainerd*, 10 Cal. App. 229, 232, 101 Pac. Rep. 691.

¹¹ **California.** *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 764; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹² **California.** But see generally *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 764; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹³ **California.** But see *Lucas v. Rea*, 10 Cal. App. 641, 645, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

¹⁴ **New Mexico.** See *Gray v. New Mexico B. S. Co.* (N. M.), 110 Pac. Rep. 603, 605.

§ 847. Same. Deducting credits and offsets. Amount paid. There is no material difference between the statement of the amount due without setting up the credits and the statement of the whole amount of the debit side of the account and also of the credits.¹⁵

Additional matter to foot-note 28.¹⁶

§ 848. Same. Immaterial variances. Where the claim of lien sets forth that the name of the owner and reputed owner of the building is a certain person and the evidence shows that he was the owner of the property until the building was completed, when it was conveyed to another person for whom he acted as agent throughout the entire transaction, there is no variance.¹⁷

§ 849. Same. Person contracting. A claim stated that the material was sold and furnished to C. and the complaint so alleged; and the evidence showed that the material was sold to H. and the court found that the material was sold, furnished and delivered to W., H. and a fourth person; held that the lien was invalid.¹⁸

Additional matter to foot-note 32.¹⁹

§ 850. Same. Contract. Date of contract.

Additional matter to foot-note 33.²⁰

¹⁵ **California.** Lucas v. Rea, 10 Cal. App. 641, 646, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

¹⁶ **California.** See Lucas v. Rea, 10 Cal. App. 641, 645, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

¹⁷ **California.** Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

¹⁸ **California.** Hogan v. Bigler, 8 Cal. App. 71, 96 Pac. Rep. 97.

¹⁹ **Oregon.** Where the claim of lien sets forth that the material and labor was furnished upon a contract with a certain person as the subcontractor under another person as an original contractor and the evidence shows that such original contractor contracted with the owner to construct the building but there is no evidence of any contractual relation between such alleged subcontractor and the original contractor, there is a fatal variance: Equitable S. & L. Assoc. v. Hewitt (Oreg.), 106 Pac. Rep. 447, 450.

²⁰ **California.** Where the claim of lien and complaint alleged a certain amount due for material, including labor for delivery thereof, such reference to labor is immaterial and may be rejected as surplage, where the evidence shows that no extra charge was made

§ 851. **Same. Implied Contract. Express contract.** Where the material-man's claim of lien states that the contractor agreed to pay for material at the current market or list prices for such material in the market at a certain rate on demand, and the evidence, as a whole, shows that the material was to be paid for upon demand after delivery, and that it was the practice of the claimant not to make such demand until after the completion of the building, there is no fatal variance.²¹ Where the complaint and claim of lien set forth an express contract and the evidence shows no agreement to pay a definite amount, there is no variance.²²

§ 852. **Same. Nature of work.** Where the complaint alleged that the material was furnished for the construction of a "dwelling," and the evidence showed that part of the material was used in a wood-shed on the same lot, the latter was considered part of the dwelling, and there was no variance.²³ Additional matter to foot-note 38.²⁴

§ 853. **Pleading and proof. Generally.**

§ 854. **Same. Material variances. Contract.**²⁵

§ 855. **Same. Valid, void contract. Contracting directly with owner or agent.**

Additional matter to foot-note 44.²⁶

therefor, that is, that the price of the lumber included the delivery: *Lucas v. Gobbi*, 10 Cal. App. 648, 653, 103 Pac. Rep. 157.

²¹ *California*. *San Pedro L. Co. v. Schroeder*, 156 Cal. 153, 103 Pac. Rep. 888.

²² *California*. *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

²³ *California*. *Lucas v. Gobbi*, 10 Cal. App. 648, 651, 103 Pac. Rep. 157.

²⁴ *New Mexico*. As to nature of labor in a mining claim: See *Gray v. New Mexico P. S. Co. (N. M.)*, 110 Pac. Rep. 603, 605.

Washington. As to "construction" and "alteration," "improvement or repair": See *Stetson & Post L. Co. v. W. & J. Sloane Co. (Wash.)*, 112 Pac. Rep. 248, 249, 250.

²⁵ See § 351, this Supplement, ante.

²⁶ *California*. As to contracting directly with owner under void contract: See *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. Rep. 822, 101 Pac. Rep. 537.

The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.).

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§ 856. **Same. Indefinite contract.**²⁷

§ 857. **Same. Person contracting.**²⁸

§ 858. **Same. Nature of work.**²⁹

§ 859. **Same. Fund. Contractual indebtedness.**

§ 860. **Same. Immaterial variances.** Where there are several contracts to paint four houses and the evidence shows an agreement made at the same time to paint the fifth house, it does not constitute a variance.³⁰

Additional matter to foot-note 50.³¹

§ 861. **Same. Time of payment.**

Additional matter to foot-note 53.³²

§ 862. **Same. Subclaimant. Owner's employees.** Where the complaint alleges that the material was furnished to three persons named, owners of the property, and there is no denial of the allegation of ownership, and the evidence shows that one of the persons named was the owner of the property until the building was completed, when he conveyed it to another of the persons named, for whom he acted as agent throughout the entire transaction, there is no variance.³³

Additional matter to foot-note 54.³⁴

§ 863. **Same. Bond. Signed by principals. Unsigned.**³⁵

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

²⁷ See §§ 208 and 296 et seq., this Supplement, ante.

²⁸ See §§ 381 et seq., this Supplement, ante.

²⁹ See §§ 130 et seq., and 395, this Supplement, ante.

³⁰ **California.** Rockwell v. Light, 6 Cal. App. 563, 566, 92 Pac. Rep. 649.

³¹ **California.** Lucas v. Gobbi, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

³² **California.** **Terms of payment:** See Otis E. Co. v. Brainerd, 10 Cal. App. 229, 232, 101 Pac. Rep. 691.

³³ **California.** Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

³⁴ **Montana.** **Joint contract alleged;** separate contract with some proved; no variance: Logan v. Billings & N. R. Co., 40 Mont. 467, 107 Pac. Rep. 415.

³⁵ See §§ 608 et seq., this Supplement, ante.

CHAPTER XL.

TRIAL AND PRACTICE.

§ 864. Practice. In general.

Additional matter to foot-note 1.¹

§ 865. Amendment. Express and implied contract.

Additional matter to foot-note 4.²

§ 866. Same. Modification of contract.

¹ **California.** Setting aside judgment and filing amended complaint: See *Lemon v. Hubbard*, 10 Cal. App. 471, 476, 102 Pac. Rep. 554.

Idaho. As to bill of particulars, see *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 794, 92 Pac. Rep. 980.

Kansas. Dismissal of action: See *Barney v. Ferguson* (Kan.), 114 Pac. Rep. 1055; *Deatherage L. Co. v. Miles* (Kan.), 116 Pac. Rep. 505.

Montana. Inspection of building in discretion of court: *Piper v. Murray* (Mont.), 115 Pac. Rep. 659, 673.

Oklahoma. Change of venue: See *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

Washington. Bill of particulars: See *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. Rep. 843, 844.

Recovery on bond in action to foreclose lien; sureties must be served with process or make appearance before judgment can be entered against them: *Kalb-Gilbert L. Co. v. Cram* (Wash.), 111 Pac. Rep. 1050; s. c., 57 Wash. 550, 107 Pac. Rep. 281 (Maritime lien).

² **Striking amended complaint from files:** See *Klokke v. Raphael*, 8 Cal. App. 1, 4, 96 Pac. Rep. 392.

Motion to amend conclusions of law so as to avoid a lien: See *Hubbard v. Lee*, 10 Cal. App. 477, 479, 102 Pac. Rep. 528; s. c., 6 Cal. App. 602, 92 Pac. Rep. 744.

Colorado. Amending complaint declaring as subcontractor so as to allege claimant to be principal contractor, in order to show that lien statement was filed within time: See *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

Kansas. Amendment setting forth conditional interest in the property subsequently acquired: See *Robert Garret L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 180.

Kansas. Refusal of amendment: See *McCullough v. S. J. Hayde C. Co.*, 82 Kan. 734, 109 Pac. Rep. 176.

Utah. Amendment from express to implied contract: See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004.

Washington. Amendment of claim of lien under statutory allowance: See *Stetson & Post L. Co. v. W. & J. Sloane Co.* (Wash.), 112 Pac. Rep. 248; *Brown v. Trimble*, 48 Wash. 270, 93 Pac. Rep. 317.

§ 867. Same. Description of property.³

Additional matter to foot-note 7.⁴

§ 868. Same. Relation of amendment to time of commencing action.

Additional matter to foot-note 8.⁵

§ 869. Consolidation of actions. Consolidation of action for the purpose of trial of all the cases does not change the issues in the respective cases, nor render the admissions of the pleadings ineffectual when applied to the particular cases in which they are made.⁶ But where one of the subclaimants sets up in his complaint a valid and properly filed original contract and the action is subsequently consolidated with others alleging facts showing that the original contract is void, the finding thereon binds all the parties to the action and any of the plaintiffs can deny the validity of the contracts.⁷ Actions to foreclose liens of subclaimants may be properly consolidated, and though the liens may fail, personal judgments may be entered against the original contractor.

Additional matter to foot-note 10.⁸

§ 870. Same. Rights of claimants against one another.

Additional matter to foot-note 16.⁹

³ See §§ 399 et seq., this Supplement, ante.

⁴ **Washington.** See *Brown v Trimble*, 48 Wash. 270, 93 Pac. Rep. 317.

⁵ **California.** See *Lemon v. Hubbard*, 10 Cal. App. 471, 476, 102 Pac. Rep. 554.

⁶ **California.** *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 526, 97 Pac. Rep. 420.

⁷ **California.** *Coghlan v. Quartararo* (Cal. App.), 115 Pac. Rep. 664, 666.

⁸ **Kansas.** *Refusal to consolidate action for breach of construction contract against subcontractor and surety with action to foreclose lien by subcontract, properly denied, where contractor admitted liability, less amount of damages claimed in action for breach: McCullough v. S. J. Hayde C. Co.*, 82 Kan. 734, 109 Pac. Rep. 176.

⁹ **Washington.** See *Ferdig v. Simpson*, 47 Wash. 475, 92 Pac. Rep. 370.

⁹ **California.** Compare *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 520, 97 Pac. Rep. 414, 420.

§ 871. **Deposit of money in court.** In New York, where the statute authorizes the owner to discharge liens by depositing in court the amount of the claim, it is well settled that upon such deposit being made, the lien is shifted from the land to the fund in court, and that no lien claimant who fails to establish his right to a lien is entitled to share in such fund;¹⁰ and this rule was held applicable under a statute not providing for such deposit.¹¹

Where the terms of the deposit are general, the deposit serves the purpose of saving the owner from costs, and it must continue to remain in the custody of the court to abide the final judgment in the case. It cannot be withdrawn pending an appeal, as it would take away the spirit and vitality of the court's judgment; and in California no such right is deducible from the statutory provision relating to appeals and stay of execution.¹²

To abide the judgment. And when a deposit of the fund is made into the court by the owner "to abide the judgment of the court," this is construed to mean the final judgment; and there is no final judgment while the appeal is pending.¹³

If the County Treasurer holds the fund, he does so as the custodian of the court; and the owner is not entitled, during an appeal, to a writ of mandate to compel the return of the deposit, where the court does not make an order for its return.¹³

Additional matter to foot-note 18.¹⁴

¹⁰ *California.* Stockton L. Co. v. Schuler, 155 Cal. 411, 413, 101 Pac. Rep. 307.

New York. Ward v. Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; Schilling, etc., Co. v. Arnott, 86 Hun. 182, 33 N. Y. Supp. 343, affirmed, 152 N. Y. 584, 46 N. E. Rep. 956.

¹¹ *California.* Stockton L. Co. v. Schuler, 155 Cal. 411, 413, 101 Pac. Rep. 307.

¹² *California.* Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 523, 97 Pac. Rep. 414, 420.

¹³ *California.* Higgins v. Keyes, 5 Cal. App. 482, 90 Pac. Rep. 972. See Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 523, 97 Pac. Rep. 414.

¹⁴ *Kansas.* As to equitable power of court to authorize substitution of deposit for lien and authorize release, in absence of statutory permission: See Wichita S. & D. Co. v. Well, 80 Kan. 606, 103 Pac. Rep. 1003, 1005.

§ 872. Same. Payment of balance of fund.¹⁵ When the fund is deposited with the clerk of the court it is his duty, unless otherwise directed by law or order of court, to pay it over to the treasurer.¹⁶

The right of the court to distribute that portion of the sum awarded to the contractor upon the deposit in the court by the owner among the persons obtaining personal judgments against the contractor is a matter which concerns the contractor only, and the owner cannot question the same. The owner is only interested in having returned to him whatever excess of the fund there may be over and above the amount found due to the original contractor.¹⁷

Additional matter to foot-note 19.¹⁸

Additional matter to foot-note 20.¹⁹

§ 873. Intervention. Effect of.

Additional matter to foot-note 21.²⁰

Washington. Tender: See *Hughes & Co. v. Flint* (Wash.), 112 Pac. Rep. 633, 635.

As to tender into Court: See *Ferdig v. Simpson*, 47 Wash., 475, 92 Pac. Rep. 370.

¹⁵ **Deposit on condemnation proceedings taking place of property upon which lien exists:** See *North Coast Ry. Co. v. Hess*, 56 Wash. 335, 105 Pac. Rep. 853; *Omaha B. & T. Co. v. Reed*, 69 Neb. 514, 96 N. W. Rep. 276; *Calumet River Ry. Co. v. Brown*, 136 Ill. 322, 26 N. E. Rep. 501, 12 L. R. A. 84; *Watson v. New York C. R. Co.*, 47 N. Y., 162; *Utter v. Richmond*, 112 N. Y., 610, 20 N. E. Rep. 654.

¹⁶ **California.** *Higgins v. Keyes*, 5 Cal. App. 482, 484, 90 Pac. Rep. 972. See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 523, 97 Pac. Rep. 414.

¹⁷ **California.** *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 522, 97 Pac. Rep. 414, 420, (and it was deemed unnecessary to determine whether the trial court was or was not authorized either by the statute or the terms of the deposit to distribute the fund among those merely obtaining personal judgments against the contractor, and who had not established their liens against the property of the owner).

¹⁸ See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 522, 97 Pac. Rep. 414, 420.

¹⁹ **California.** See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 523, 97 Pac. Rep. 414, 420; *Higgins v. Keyes*, 5 Cal. App. 482, 90 Pac. Rep. 972.

²⁰ **California.** See *Hartwell v. Ganahl L. Co.*, 8 Cal. App. 733, 97 Pac. Rep. 901.

Wyoming. See *Greenawalt v. Natrona I. Co.*, 16 Wyo., 226, 92 Pac. Rep. 1008.

§ 874. Same. Right to intervene.

Additional matter to foot-note 23.²¹

§ 875. Jury trial.

Additional matter to foot-note 24.²²

Additional matter to foot-note 25.²³

Additional matter to foot-note 26.²⁴

²¹ **Colorado. Bringing in other parties:** See *Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. Rep. 570, 572.

²² **Instructions:**

California. As to changes in plans and delay in completion: See *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, 12 Cal. App. 37, 42, 106 Pac. Rep. 413.

As to sequence of injury and breach: *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, supra.

As to extending time to complete contract because of delay and changes made: See *Lacy Mfg. Co. v. Los Angeles G. & E. Co.*, supra.

Colorado. As to additional time for performance equal to delay caused by owner: See *Idaho G. C. M. & M. Co. v. Colorado I. W. Co.* (Colo.), 111 Pac. Rep. 553.

As to allowance of interest: See *Idaho G. C. M. & M. Co. v. Colorado I. W. Co.*, supra.

As to performance of contract: See *Idaho G. C. M. & M. Co. v. Colorado I. W. Co.*, supra.

Montana. As to waiver of certificate: See *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 673.

As to construction of contract: *Piper v. Murray*, supra.

New Mexico. As to items in cost of construction: See *Neher v. Viviani* (N. M.), 110 Pac. Rep. 695, 697.

Utah. As to completion of dam: See *Ryan v. Curlew I. & R. Co.* (Utah), 104 Pac. Rep. 218, 222.

As to contract for digging well: See *Prye v. Kelbaugh*, 34 Utah 306, 97 Pac. Rep. 331, 333.

Washington. As to rescission of written contract: See *Evans v. Oregon & W. R. Co.*, 58 Wash. 429, 108 Pac. Rep. 1095, 1097.

Instructions generally:

Kansas. See *Wichita S. & D. Co. v. Well*, 80 Kan. 606, 103 Pac. Rep. 1003, 1005.

Montana. *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 673.

Utah. See *Ryan v. Curlew I. & R. Co.* (Utah), 104 Pac. Rep. 218, 222.

Jury trial; Special issue: See *Burke v. Dittus*, 8 Cal. App. 175, 176, 96 Pac. Rep. 330.

²³ **California.** *Coghlan v. Quartararo* (Cal. App.), 115 Pac. Rep. 664, 666.

Oklahoma. But see *Jones v. Balsley* (Okla.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

Oregon. *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533

Washington. *Pacific I. & S. Works v. Goerig*, 55 Wash. 149, 104 Pac. Rep. 151.

²⁴ **California.** See *Coghlan v. Quartararo* (Cal. App.), 115 Pac. Rep. 664, 666.

Colorado. *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 919.

§ 876. **Same. Verdict. Setting aside verdict.**
Additional matter to foot-note 27.²⁵

§ 877. **New trial.**
Additional matter to foot-note 28.²⁶

§ 878. **Nonsuit.²⁷ When sustained upon appeal.**

§ 879. **Same. When not granted.**
Additional matter to foot-note 30.²⁸

§ 880. **Same. Statute of limitations.²⁹**

§ 881. **Same. Time of filing claim.³⁰**

§ 882. **Same. Excessive claim. Forfeiture.**
Additional matter to foot-note 34.³¹

Idaho. Naylor & Norlin v. Lewiston & S. E. E. Ry. Co., 14 Idaho 722, 95 Pac. Rep. 827, 828, 96 Pac. Rep. 573.

²⁵ **California.** Compare Seebach v. Kuhn, 9 Cal. App. 485, 490, 99 Pac. Rep. 723.

²⁶ **New Trial:**

California. See Dahlberg v. Girsch, 157 Cal. 324, 326, 107 Pac. Rep. 616; Coghlan v. Quartararo (Cal. App.), 115 Pac. Rep. 664.

Idaho. See Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Montana. See Hamilton v. Monidah Trust, 39 Mont. 269, 102 Pac. Rep. 335.

Oregon. On appeal: See Edmunds v. Welling (Oreg.), 110 Pac. Rep. 533.

Washington. See Shaw v. Spencer, 57 Wash. 587, 107 Pac. Rep. 383; Mortimer v. Dirks, 57 Wash. 402, 107 Pac. Rep. 184, 186.

Wyoming. See Greenawalt v. Natrona I. Co., 16 Wyo. 226, 92 Pac. Rep. 1008.

Notice of intention:

Idaho. See Naylor & Norlin v. Lewiston & S. E. E. Ry. Co., 14 Idaho 789, 96 Pac. Rep. 573, 95 Pac. Rep. 827.

Montana. See McIntyre v. Montana G. M. M. Co., 41 Mont. 87, 108 Pac. Rep. 353.

²⁷ **Nonsuit:**

Washington. See Evans v. Oregon & W. R. Co., 58 Wash. 429, 108 Pac. Rep. 1095.

²⁸ **California.** See Coghlan v. Quartararo (Cal. App.), 115 Pac. Rep. 664, 667.

²⁹ See § 649, this Supplement, ante.

³⁰ See §§ 422 et seq., this Supplement, ante.

³¹ **Nonsuit:**

§ 883. Same. Admission in answer. Contract.
Additional matter to foot-note 35.³²

§ 884. Same. Common counts.³³ Express contract.

California. See *San Pedro L. Co. v. Schroeter*, 156 Cal. 158, 160, 103 Pac. Rep. 888.

³² **Nonsuit:**

California. See *Hill v. Clark*, 7 Cal. App. 609, 611, 612, 95 Pac. Rep. 382.

³³ See § 673, this Supplement, ante.

CHAPTER XLI.

FINDINGS.

§ 885. **Findings. Scope of chapter.** The object of pleadings is to arrive at the issue or issues on which the cause of action or defense thereof depends. The object of findings is to determine such issue or issues. Findings should be so construed as to support the judgment when it can be done. If apparently inconsistent, they should be reconciled, if reasonably possible to do so. If upon an immaterial issue, they should be disregarded. If, taking them as a whole, they fairly dispose of the material issues raised by the pleadings on which evidence was offered, the judgment will be upheld.¹ Additional matter to foot-note 1.²

§ 886. **Issues to be found upon.** A finding that all of the allegations of the complaint are true is sufficient, as such finding negatives the denial of the answer as to the allegation of the complaint;³ but a general omnibus finding, "that

¹ **California.** Needham v. Chandler, 8 Cal. App. 124, 128, 96 Pac. Rep. 325.

² **Presumptions in favor of findings on appeal:** See §§ 976 and 980, this Supplement, post.

California. Re-trial: Adoption of former findings after appeal: See Barrett-Hicks Co. v. Glas (Cal. App.), 111 Pac. Rep. 760; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

Evidence of acquiescence in delay held to support findings: See Sirch E. & T. L. v. Garbutt, 13 Cal. App. 435, 110 Pac. Rep. 140.

Idaho. Amount of damage for malperformance: See Steltz v. Armory Co., 15 Idaho 551, 99 Pac. Rep. 98, 101.

Washington. One cannot attack findings requested by him: Jensen v. Sheard, 49 Wash. 593, 96 Pac. Rep. 2.

On trial de novo in Appellate Court, findings of lower court given due weight, but evidence reviewed: Pacific L. & T. Co. v. Dalley (Wash.), 111 Pac. Rep. 869, 870.

As to breach of contract for grading work: See Pinickneff v. Johnson, 54 Wash. 156, 102 Pac. Rep. 1047.

As to modification of contract: See Jones v. Nelson (Wash.), 112 Pac. Rep. 88.

³ **California.** Needham v. Chandler, 8 Cal. App. 124, 128, 96 Pac. Rep. 325.

all the material denials and averments of the answer to the complaint herein are true, and all the material averments of the amended complaint in intervention are true," is insufficient for any purpose.⁴ If the effect of an affirmative allegation with regards to performance of the contract following and in connection with a denial is but to emphasize the denial of the answer, it is not necessary that there should be a finding on such affirmative allegation.⁵ If an issue is joined as to priority of liens, the issue should be found upon by the court.

Additional matter to foot-note 3.⁶

Additional matter to foot-note 8.⁷

Additional matter to foot-note 9.⁸

Additional matter to foot-note 10.⁹

§ 887. Finding to cover entire issue. It seems that a mere finding as to the incorrectness of the description in a claim of lien is not equivalent to a finding that such incorrect description fails to properly identify the property.¹⁰

Additional matter to foot-note 11.¹¹

§ 888. Same. Defective findings. It is not necessary that there should be a correct finding with reference to the amount remaining unpaid in the hands of the owner from the 35-day payment, under the statutory original contract as it

⁴ *California*. Holt Mfg. Co. v. Collins, 154 Cal. 265, 273, 97 Pac. Rep. 516.

⁵ *California*. Needham v. Chandler, 8 Cal. App. 124, 128, 96 Pac. Rep. 325.

⁶ *California*. Abandonment: See Hoffman-Marks Co. v. Spires, 154 Cal. 111, 118, 97 Pac. Rep. 152. See Western L. & M. Co. v. Merchants' A. Co., 13 Cal. App. 4, 108 Pac. Rep. 891, 894.

Colorado. But see Ross M. & M. Co. v. Sethman (Colo.), 114 Pac. Rep. 287.

⁷ *Colorado*. See Ross M. & M. Co. v. Sethman (Colo.), 114 Pac. Rep. 287.

⁸ *Utah*. See Midgley v. Campbell B. Co. (Utah), 112 Pac. Rep. 820.

⁹ *California*. See Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520, 97 Pac. Rep. 414, 420.

¹⁰ *California*. Patten & Davies L. Co. v. Gibson, 9 Cal. App. 23, 25, 98 Pac. Rep. 37, 38. (Dictum.)

¹¹ *California*. See Copley v. Durand, 153 Cal. 278, 281, 95 Pac. Rep. 38.

Idaho. See Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 796, 92 Pac. Rep. 980.

§ 856. **Same. Indefinite contract.**²⁷

§ 857. **Same. Person contracting.**²⁸

§ 858. **Same. Nature of work.**²⁹

§ 859. **Same. Fund. Contractual indebtedness.**

§ 860. **Same. Immaterial variances.** Where there are several contracts to paint four houses and the evidence shows an agreement made at the same time to paint the fifth house, it does not constitute a variance.³⁰

Additional matter to foot-note 50.³¹

§ 861. **Same. Time of payment.**

Additional matter to foot-note 53.³²

§ 862. **Same. Subclaimant. Owner's employees.** Where the complaint alleges that the material was furnished to three persons named, owners of the property, and there is no denial of the allegation of ownership, and the evidence shows that one of the persons named was the owner of the property until the building was completed, when he conveyed it to another of the persons named, for whom he acted as agent throughout the entire transaction, there is no variance.³³

Additional matter to foot-note 54.³⁴

§ 863. **Same. Bond. Signed by principals. Unsigned.**³⁵

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

²⁷ See §§ 208 and 296 et seq., this Supplement, ante.

²⁸ See §§ 381 et seq., this Supplement, ante.

²⁹ See §§ 130 et seq., and 395, this Supplement, ante.

³⁰ **California.** Rockwell v. Light, 6 Cal. App. 563, 566, 92 Pac. Rep. 649.

³¹ **California.** Lucas v. Gobbi, 10 Cal. App. 648, 652, 103 Pac. Rep. 157.

³² **California.** **Terms of payment:** See Otis E. Co. v. Brainerd, 10 Cal. App. 229, 232, 101 Pac. Rep. 691.

³³ **California.** Lucas v. Gobbi, 10 Cal. App. 648, 650, 103 Pac. Rep. 157.

³⁴ **Montana.** **Joint contract alleged;** separate contract with some proved; no variance: Logan v. Billings & N. R. Co., 40 Mont. 467, 107 Pac. Rep. 415.

³⁵ See §§ 608 et seq., this Supplement, ante.

CHAPTER XL.

TRIAL AND PRACTICE.

§ 864. Practice. In general.

Additional matter to foot-note 1.¹

§ 865. Amendment. Express and implied contract.

Additional matter to foot-note 4.²

§ 866. Same. Modification of contract.

¹ **California.** Setting aside judgment and filing amended complaint: See *Lemon v. Hubbard*, 10 Cal. App. 471, 476, 102 Pac. Rep. 554.

Idaho. As to bill of particulars, see *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 794, 92 Pac. Rep. 980.

Kansas. Dismissal of action: See *Barney v. Ferguson* (Kan.), 114 Pac. Rep. 1055; *Deatherage L. Co. v. Miles* (Kan.), 116 Pac. Rep. 505.

Montana. Inspection of building in discretion of court: *Piper v. Murray* (Mont.), 115 Pac. Rep. 659, 673.

Oklahoma. Change of venue: See *Jones v. Balsley* (Okl.), 111 Pac. Rep. 942; s. c., 25 Okl. 344, 106 Pac. Rep. 830.

Washington. Bill of particulars: See *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. Rep. 843, 844.

Recovery on bond in action to foreclose lien; sureties must be served with process or make appearance before judgment can be entered against them: *Kalb-Gilbert L. Co. v. Cram* (Wash.), 111 Pac. Rep. 1050; s. c., 57 Wash. 550, 107 Pac. Rep. 281 (Maritime lien).

² **Striking amended complaint from files:** See *Klokke v. Raphael*, 8 Cal. App. 1, 4, 96 Pac. Rep. 392.

Motion to amend conclusions of law so as to avoid a lien: See *Hubbard v. Lee*, 10 Cal. App. 477, 479, 102 Pac. Rep. 528; s. c., 6 Cal. App. 602, 92 Pac. Rep. 744.

Colorado. Amending complaint declaring as subcontractor so as to allege claimant to be principal contractor, in order to show that lien statement was filed within time: See *Foley v. Coon*, 41 Colo. 432, 93 Pac. Rep. 13, 14.

Kansas. Amendment setting forth conditional interest in the property subsequently acquired: See *Robert Garret L. Co. v. Loftus*, 82 Kan. 556, 109 Pac. Rep. 179, 180.

Kansas. Refusal of amendment: See *McCullough v. S. J. Hayde C. Co.*, 82 Kan. 734, 109 Pac. Rep. 176.

Utah. Amendment from express to implied contract: See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. Rep. 1004.

Washington. Amendment of claim of lien under statutory allowance: See *Stetson & Post L. Co. v. W. & J. Sloane Co.* (Wash.), 112 Pac. Rep. 248; *Brown v. Trimble*, 48 Wash. 270, 93 Pac. Rep. 317.

§ 896. Same. Void contract.

Additional matter to foot-note 41.²⁸

§ 897. Findings sufficient to support judgment.

Additional matter to foot-note 42.²⁹

§ 898. Agency.³⁰

§ 899. Same. Insufficient finding.

§ 900. Same. Request of owner.

Additional matter to foot-note 48.³¹

§ 901. Same. Void contract.³²

§ 902. When findings may not be attacked.³³

²⁸ *California*. See *Western L. & M. Co. v. Merchants' A. Co.*, 13 Cal. App. 4, 108 Pac. Rep. 891, 894.

The Statutory Original Contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

²⁹ *California*. See, generally, *Barber A. P. Co. v. Santa Barbara I. Co.*, 13 Cal. App. 597, 110 Pac. Rep. 463; *Stimson M. Co. v. Hughes Mfg. Co.*, 5 Cal. App. 559, 97 Pac. Rep. 322, 323; *Lucas v. Gobbi*, 10 Cal. App. 648, 653, 103 Pac. Rep. 157; *Fairchild-Gilmore-Wilton Co. v. Southern R. Co.*, 158 Cal. 264, 110 Pac. Rep. 951, 953.

³⁰ See "Agency," §§ 572 et seq., this Supplement, ante.

³¹ *California*. **Owner acting through agent:** See *Western L. & M. Co. v. Merchants' A. Co.*, 13 Cal. App. 4, 108 Pac. Rep. 891.

³² *California*. The Statutory Original Contract was abolished by amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. & Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 268, 274, 281, 288, and 328, this Supplement, ante.

³³ See "Appeal," §§ 980 et seq., this Supplement, post.

CHAPTER XLII.

DECREE.

§ 903. **General nature of decree foreclosing liens.** Where neither the owner nor contractor raises any objection to the disposition of the balance of the fund, an order or judgment that the balance be paid to claimants who have not established their lien is too favorable to them, and they cannot be heard to object to such order on appeal nor to attack the judgment giving a lien to those who have established the same.¹ When the statutory original contract is void and the lien is direct, the court may properly deny the owner's demand for an accounting and apportionment of the amount due among the several claimants.²

Additional matter to foot-note 1.³

Additional matter to foot note 2.⁴

¹ **California.** Stockton L. Co. v. Schuler, 155 Cal. 411, 414, 101 Pac. Rep. 307.

² **California.** Coghlan v. Quartararo (Cal. App.), 115 Pac. Rep. 664, 666.

³ **Idaho.** Judgment foreclosing mechanics' lien is not a money judgment within the meaning of § 4, 810 Rev. Stats. of 1887, corresponding to § 942, Code Civ. Proc. of California: Naylor & Norlin v. Lewiston & S. E. Ry. Co., 14 Idaho 722, 95 Pac. Rep. 827, 828, 96 Pac. Rep. 573.

Kansas. Action to foreclose cannot be summarily dismissed on motion of person not party to the action: Deatherage L. Co. v. Miles (Kan.), 116 Pac. Rep. 505.

Washington. Judgment for provisional lien against the property of the owner for a certain sum, conditioned upon the payment of that amount into the registry of the court within a certain time after rendition of the judgment: See Hughes & Co. v. Flint (Wash.), 112 Pac. Rep. 633.

Judgment against surety in action to foreclose lien: See Kalb-Gilbert L. Co. v. Cram (Wash.), 111 Pac. Rep. 1050; s. c., 57 Wash. 550, 107 Pac. Rep. 381.

Judgment quieting title protecting lien for improvements: See Palmer v. Abrahams, 55 Wash. 352, 104 Pac. Rep. 648.

⁴ **Colorado.** Barnes v. Colorado Springs & C. D. Ry. Co., 42 Colo. 461, 94 Pac. Rep. 570, 573.

Oklahoma. Judgment in favor of subcontractor's employee cannot be rendered, if the court does not acquire jurisdiction of his person: Alberti v. Moore, 20 Okl. 78, 92 Pac. Rep. 542, 547.

Additional matter to foot-note 3.⁵

§ 904. Effect of decree on third persons.

Additional matter to foot-note 5.⁶

§ 905. Consolidated action. Where actions of sub-lien claimants to foreclose liens against the owner and the original contract are properly consolidated under the statute and the liens fail, a single personal judgment against the original contractor may be entered.⁷

§ 906. Kind of money in which judgment is to be satisfied.

§ 907. Interest. The fact that appellants who claimed under a deed of trust were not parties to any of the claims sued upon, and that they were contracted without their knowledge, does not affect the right of lien holders to interest, where the appellants claimed under a person who incurred the liability and under an instrument executed after the liability had become a lien against the property, and consequently have only the rights in the property which the owner had when the deed of trust was executed.⁸

Additional matter to foot-note 9.⁹

⁵ *California.* Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 463, 94 Pac. Rep. 775.

⁶ See § 907, this Supplement, post.

California. See Farnham v. California S. D. & T. Co., 8 Cal. App. 266, 273, 96 Pac. Rep. 788.

As to effect of decree foreclosing street assessment lien: See Los Angeles County v. Winans, 13 Cal. App. 234, 109 Pac. Rep. 640, 650.

Direct and collateral attack upon decree of foreclosure and presumptions regarding jurisdiction: See Western L. & M. Co. v. Merchants' A. Co., 13 Cal. App. 4, 108 Pac. Rep. 891. See Lemon v. Hubbard, 10 Cal. App. 471, 475, 102 Pac. Rep. 554.

Utah. As to subsequent creditors: See Park City M. Co. v. Comstock S. M. Co., Utah, 103 Pac. Rep. 254, 258.

Washington. Compare Kalb-Gilbert L. Co. v. Cram (Wash.), 111 Pac. Rep. 1050; s. c., 57 Wash. 550, 107 Pac. Rep. 381.

⁷ *California.* Nordstrom v. Corona City W. Co., 155 Cal. 206, 210, 100 Pac. Rep. 242.

⁸ *California.* Farnham v. California S. D. & T. Co., 8 Cal. App. 266, 273, 96 Pac. Rep. 788.

⁹ *California.* Burnett v. Glas, 154 Cal. 249, 259, 260, 97 Pac. Rep. 423; s. c., sub nom. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. Rep. 856.

Additional matter to foot-note 10.¹⁰

§ 908. Same. Contractor.

Additional matter to foot-note 13.¹¹

§ 909. Same. Unliquidated demands.

Additional matter to foot-note 14.¹²

§ 910. Same. Interest of subcontractor's claimants, charge against subcontractor.¹³

§ 911. Same. Valid contract. Payment of fund into court by owner.¹⁴

§ 912. Default. Modification of judgment.¹⁵

§ 913. Default judgment against owner.¹⁵

§ 914. Personal judgment. When not required.¹⁶

§ 915. Same. When obtained.

Additional matter to foot-note 26.¹⁷

Colorado. See *Idaho C. C. & M. Co. v. Colorado I. W. Co.* (Colo.), 111 Pac. Rep. 535, 555.

Washington. Interest properly allowable from the date when the lien notice is filed: *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

¹⁰ **California.** *Burnett v. Glas*, 154 Cal. 249, 259, 260, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856.

¹¹ **Washington.** See *Jones v. Nelson* (Wash.), 112 Pac. Rep. 88.

¹² **California.** *Coghlan v. Quartararo* (Cal. App.), 115 Pac. Rep. 664, 667; *Burnett v. Glas*, 154 Cal. 249, 260, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856.

¹³ See "Subcontractor," §§ 66 et seq., this Supplement, post.

¹⁴ See "Deposit," § 871, this Supplement, ante.

¹⁵ See § 657, this Supplement, ante.

¹⁶ See §§ 662 et seq., this Supplement, ante.

¹⁷ **California.** *Nordstrom v. Corona City W. Co.*, 155 Cal. 206, 100 Pac. Rep. 242.

Colorado. See *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 921 (owner entitled to judgment against contractor for excess payment of liens above amount due contractor).

Idaho. *Valley L. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Oklahoma. *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 546.
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Additional matter to foot-note 27.¹⁸

§ 916. Same. Purchaser of property assuming debt.

§ 917. Same. Notice to owner to withhold payments.
Additional matter to foot-note 32.¹⁹

§ 918. Same. Subclaimant against contractor. Default.
Additional matter to foot-note 33.²⁰

§ 919. Same. When not given.
Additional matter to foot-note 34.²¹
Additional matter to foot-note 35.²²
Additional matter to foot-note 36.²³

§ 920. Same. Death of owner. Recovery against estate.
Additional matter to foot-note 37.²⁴

¹⁸ Washington. Tsutakawa v. Kumamoto, 53 Wash. 231, 102 Pac. Rep. 766, 101 Pac. Rep. 869.

¹⁹ California. See Hubbard v. Lee, 10 Cal. App. 477, 478, 102 Pac. Rep. 528; s. c., 6 Cal. App. 602, 92 Pac. Rep. 744.

²⁰ Washington. No recovery against contractor on general accounts without issues framed: Hughes & Co. v. Flint (Wash.), 112 Pac. Rep. 633, 635.

²¹ Arizona. Harper v. Independence D. Co. (Ariz.), 108 Pac. Rep. 701.

California. Merced L. Co. v. Bruschi, 152 Cal. 372, 375, 92 Pac. Rep. 844. See Goldtree v. City of San Diego, 8 Cal. App. 505, 506, 97 Pac. Rep. 216; s. c., 8 Cal. App. 512, 97 Pac. Rep. 218.

Kansas. See Robert Garrett L. Co. v. Loftus, 82 Kan. 556, 109 Pac. Rep. 179, 180, 181.

Oklahoma. See Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 547.

Utah. Volker-Scowcroft L. Co. v. Vance (Utah), 103 Pac. Rep. 970; s. c., 32 Utah 74, 88 Pac. Rep. 896.

Washington. Shaw v. Spencer, 57 Wash. 587, 107 Pac. Rep. 383.

²² California. Merced L. Co. v. Bruschi, 152 Cal. 372, 375, 92 Pac. Rep. 844.

²³ Oklahoma. Alberti v. Moore, 20 Okl. 78, 93 Pac. Rep. 543, 546.

²⁴ California. See in re Hincleon's Estate (Cal. Sup.), 116 Pac. Rep. 47.

Oregon. Brown v. Truax (Oreg.), 115 Pac. Rep. 597.

South Dakota. See Fish v. De Laray, 8 So. Dak. 320, 66 N. W. Rep. 465.

Washington. See Casey v. Ault, 4 Wash. 167, 29 Pac. Rep. 1048.

§ 921. Same. Jurisdiction of superior court to render personal judgment in suit to foreclose lien.

Additional matter to foot-note 38.²⁵

§ 922. Deficiency judgment.

Additional matter to foot-note 39.²⁶

Additional matter to foot-note 40.²⁷

§ 923. Same. Notice to owner to withhold payments.²⁸

§ 924. Same. Judgment for gross amount.

§ 925. Same. Form of judgment.

§ 926. Prior mortgage. Decree of sale. The court foreclosing mechanics' liens may decree the payment of a mortgage debt if it is not due, where some of the mechanics' lien are prior thereto and some subsequent thereto; but if all of the liens are prior to the mortgage or all are subsequent thereto, or if there are some prior and some subsequent and all of either class are paid off, it is error for the court to enter a decree having the effect of maturing the unmatured mortgage debt, and no provision should be made in the decree for the payment of the mortgage; as, in the case of prior mechanics' liens, the mortgagee would have to redeem from the lien sale to preserve his claim, and in the case of a prior mortgage, the property would be sold subject thereto.²⁹

²⁵ **Washington.** See *Pacific I. & S. Works v. Goerig*, 55 Wash. 149, 104 Pac. Rep. 151.

²⁶ **California.** See *Danaldson v. Orchard C. O. Co.*, 6 Cal. App. 641, 92 Pac. Rep. 1046.

²⁷ **Idaho.** See *Naylor & Norlin v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 722, 25 Pac. Rep. 827, 96 Pac. Rep. 573.

²⁸ See §§ 547 et seq., this Supplement, ante.

²⁹ *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 766; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423. See this case in its various stages, with regard to this question.

§ 927. **Interests in land. When can be ordered sold.**
Additional matter to foot-note 50.³⁰

§ 928. **Recitals in decree. Foreclosure of interest.**³¹

§ 929. **Same. Ownership. Knowledge.**³²

§ 930. **Extent of lien. Statutory provision.**³³

§ 931. **Same. Necessity of designating property to be sold.**

Additional matter to foot-note 55.³⁴

§ 932. **Same. Effect of failure to define extent of land.**
Additional matter to foot-note 56.³⁵

§ 933. **Same. Order directing sale of entire building.**
Additional matter to foot-note 57.³⁶

§ 934. **Same. Land necessary for convenient use and occupation.**

Additional matter to foot-note 58.³⁷

³⁰ **California.** See *Danaldson v. Orchard C. O. Co.*, 6 Cal. App. 641, 92 Pac. Rep. 1046.

Utah. Sale carrying with it certain easements: *Park City M. Co. v. Comstock S. M. Co.* (Utah), 103 Pac. Rep. 254, 261.

Washington. As to leasehold interests: See *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

³¹ See "Extent of lien," §§ 459 et seq., this Supplement, ante.

³² See §§ 469 et seq., this Supplement, ante.

³³ See § 1195, Code Civ. Proc., as amended May 1, 1911 (Stats. & Amdts. 1911, pp. 1313 et seq.).

³⁴ **California.** See *Patten & Davies L. Co. v. Gibson*, 9 Cal. App. 23, 25, 98 Pac. Rep. 37, 38. Compare *Chapman v. Zobelein*, 152 Cal. 216, 92 Pac. Rep. 188.

Utah. As to mining claim: See *Park City M. Co. v. Comstock S. M. Co.* (Utah), 103 Pac. Rep. 254, 261.

³⁵ **Washington.** See *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

³⁶ **Utah.** See *Park City M. Co. v. Comstock S. M. Co.* (Utah), 103 Pac. Rep. 254, 259.

³⁷ **New Mexico.** As to mining claim: See *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 706, 710.

Utah. As to mining claim: See *Park City M. Co. v. Comstock S. M. Co.* (Utah), 103 Pac. Rep. 254, 259.

CHAPTER XLIII.

COSTS AND ATTORNEYS' FEES.

§ 935. **Costs and attorneys' fees. Statutory provision.**
Additional matter to foot-note 1.¹

§ 936. **Costs. Preparing, filing, and recording claim of lien.**
Additional matter to foot-note 7.²

§ 937. **Same. Recovery by owner.** Where no claim is made in the complaint in an action upon the contractor's bond to recover attorneys' fees necessarily paid by the owner, such costs cannot be covered.³

§ 938. **Same. Recovery of costs against owner. Prolonging litigation.**
Additional matter to foot-note 10.⁴

§ 939. **Same. Owner may set off costs and interests against contractor, when.** Allowance of attorneys' fees on

¹ **California.** Costs on appeal; not allowed against certain respondents where judgment is modified on appeal: See *Burnett v. Glas*, 154 Cal. 249, 261, 97 Pac. Rep. 423; s. c., sub nom. *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. Rep. 856.

Apportionment of costs between appellant and respondents: See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 524, 97 Pac. Rep. 414, 420.

Idaho. Mileage and per diem allowed for attendance of subcontractors, not parties, but interested: See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 799, 92 Pac. Rep. 980.

Oregon. Costs on appeal: See *Litherland v. S. Morton Cohn R. E. & I. Co.*, 54 Oreg. 1, 102 Pac. Rep. 303, 100 Pac. Rep. 1.

Washington. As to costs: See *Jensen v. Sheard*, 49 Wash. 593, 96 Pac. Rep. 2.

As to Attorney's fees: See *Rieflin v. Grafton* (Wash.), 115 Pac. Rep. 851, 853.

² **Montana.** *Neuman v. Grant*, 36 Mont. 77, 92 Pac. Rep. 43.

³ **California.** *Klokke v. Raphael*, 8 Cal. App. 1, 6, 96 Pac. Rep. 392.

⁴ **California.** See *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 523, 97 Pac. Rep. 414, 420.

foreclosure of mechanics' liens where statute has been held unconstitutional is error, and will be stricken from the judgment.⁵ And a direction that the same be paid from the fund deposited in court is void, and the owner is entitled to have the judgment allowing the same modified.⁶

Additional matter to foot-note 11.⁷

§ 940. Attorneys' fees. Unconstitutionality of provision.

Additional matter to foot-note 16.⁸

Additional matter to foot-note 18.⁹

⁵ **California.** Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 464, 94 Pac. Rep. 775.

⁶ **California.** Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 520.

⁷ **California.** Recovery by owner against contractor's surety for attorneys' fees where fund was exhausted by payment to lien claimants: Klokke v. Raphael, 8 Cal. App. 1, 5, 96 Pac. Rep. 392, distinguishing Burnett v. Glas, 97 Pac. Rep. 423 (154 Cal. 249). See Sheard v. United States F. & G. Co., 58 Wash. 29, 107 Pac. Rep. 1024, 1027.

⁸ **California.** Burnett v. Glas, 154 Cal. 249, 260, 97 Pac. Rep. 423; s. c., sub nom. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. Rep. 856; Farnham v. California S. D. & T. Co., 8 Cal. App. 266, 274, 96 Pac. Rep. 788. See Holt Mfg. Co. v. Collins, 154 Cal. 265, 268, 97 Pac. Rep. 516 (threshing machine), and Engebretson v. Gay, 158 Cal. 30, 109 Pac. Rep. 880; s. c., 158 Cal. 27, 109 Pac. Rep. 879; s. c., sub nom. Gay v. Engebretson, 158 Cal. 21, 109 Pac. Rep. 877.

Idaho. Provision for attorneys' fee not unconstitutional because not providing allowance for opposite party: Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 799, 92 Pac. Rep. 980.

New Mexico. Constitutionality of provision for attorneys' fees reaffirmed: Gray v. New Mexico P. S. Co. (N. M.), 110 Pac. Rep. 603, 605.

Oklahoma. Provision for the allowance of attorneys' fees unconstitutional as violating xiv Amendment of the Constitution of the United States, as not giving the defendant the equal protection of the laws: Chicago R. I. & T. Ry. Co. v. Mashore, 21 Okl. 275, 96 Pac. Rep. 630, 633.

⁹ **California.** Farnham v. California S. D. & T. Co., 8 Cal. App. 266, 274, 96 Pac. Rep. 788; Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 522, 523, 97 Pac. Rep. 414, 420; Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 7 Cal. App. 460, 464, 94 Pac. Rep. 775; Barrett-Hicks Co. v. Glas, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423; H. Raphael Co. v. Grote, 154 Cal. 137, 138, 97 Pac. Rep. 155; Pacific L. Co. v. Wilson, 6 Cal. App. 561, 563, 92 Pac. Rep. 654; Danaldson v. Orchard C. O. Co., 6 Cal. App. 641, 645, 92 Pac. Rep. 1046; Hill v. Clark, 7 Cal. App. 609, 613, 95 Pac. Rep. 382; Hartwell v. Ganahl L. Co., 8 Cal. App. 733, 737, 97 Pac. Rep. 901.

§ 941. Same. Attorneys' fees not allowed, except on foreclosure of liens on property.

Additional matter to foot-note 20.¹⁰

§ 942. Same. Nature of attorneys' fees allowed, and their relation to costs.

Additional matter to foot-note 22.¹¹

Additional matter to foot-note 23.¹²

Additional matter to foot-note 24.¹³

943. Same. Measure of attorneys' fees. Elements for determination. Magnitude of the case, peculiar character of the contract under which the plaintiff was operating, nature of the work and the obstacles with which he met in attempting to recover under the contract, and the obstinacy with which the case was contested, are elements to be considered by the court in determining what are reasonable attorneys' fees, when they are allowable.¹⁴

Additional matter to foot-note 25.¹⁵

¹⁰ **Idaho.** Attorneys' fees: See, generally, *Naylor & Norlin v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 722, 95 Pac. Rep. 827, 828, 96 Pac. Rep. 573.

¹¹ **Idaho.** *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

¹² **Washington.** Attorneys' fees allowed in judgment and subsequently taxed as costs; no error where amount taxed as costs remitted: *Ferdig v. Simpson*, 47 Wash. 475, 92 Pac. Rep. 370.

¹³ **Idaho.** *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

¹⁴ **Idaho.** *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 799, 92 Pac. Rep. 980.

¹⁵ **California.** Under heading "reasonable attorneys' fees," strike out in citation of *Castagnetto v. Coppertown M. & S. Co.*, 146 Cal. 329, 334, 80 Pac. Rep. 74, the word "cents" after "seventy-five," and insert "dollars."

Attorneys' fees:

Idaho. Amount recovered, \$3124.70; attorneys' fees, \$250: *Naylor & Norlin v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 722, 95 Pac. Rep. 827, 96 Pac. Rep. 573. Amount recovered, \$46.50; attorneys' fees, \$50: *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399. Amount recovered, \$162,211.26; attorneys' fees, \$10,000 (held reasonable): *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 799, 92 Pac. Rep. 980.

Montana. See *MyIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 355.

New Mexico. Amount recovered, \$3,251.36; attorneys' fees, \$250: *Baldrige v. Morgan (N. M.)*, 106 Pac. Rep. 342. See *Stearns-Roger Mfg. Co. v. Aztec G. M. & M. Co.*, 14 N. M. 300, 93 Pac. Rep. 906, 913.

Additional matter to foot-note 27.¹⁶

Additional matter to foot-note 29.¹⁷

§ 944. Same. Relation of legal services to action.

Additional matter to foot-note 30.¹⁸

§ 945. Same. Agreement as to fees.

Additional matter to foot-note 34.¹⁹

§ 946. Same. Lower court fixing attorneys' fees in supreme court.²⁰

Oklahoma. Action for recovery of attorneys' fees, \$300, in a number of mechanics' lien suits: See *Mellon v. Fulton*, 22 Okl. 636, 98 Pac. Rep. 911, 914.

Oregon. Amount recovered, \$2,579.70; attorneys' fees, \$250 (upon uncontradicted proof of reasonable allowance—increased from \$200, upon appeal): *McInnis v. Buchanan*, 53 Oreg. 229, 99 Pac. Rep. 929, 932.

Washington. Amount recovered, \$129.58; attorneys' fees, \$25: *Popiella v. Zolawenski*, 51 Wash. 39, 97 Pac. Rep. 972. Amount recovered, \$655.20; attorneys' fees, \$100: *Helmer v. Title G. & S. Co.*, 50 Wash. 411, 97 Pac. Rep. 451. Amount recovered, \$31.75; attorneys' fees, \$25: *Olson v. Goodsell*, 56 Wash. 251, 105 Pac. Rep. 463. Amount recovered, \$740; attorney's fees, \$100: *Williams v. Lewis N. Rosenbaum Co.*, 57 Wash. 94, 106 Pac. Rep. 493. Amount recovered, \$1,420.86; attorneys' fees, \$200: *Cornelius v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 728. Amount of total liens, \$5,714.35; attorneys' fees, \$1,000: *Sheard v. United States F. & G. Co.*, 58 Wash. 29, 107 Pac. Rep. 1024, 1026 (appeals). Amount recovered, \$340.37; attorneys' fees, \$150 (stipulation that court fix fees): *Housekeeper v. Livingstone*, 48 Wash. 209, 93 Pac. Rep. 217, 218.

See § 945, this Supplement, post.

¹⁶ **Idaho.** The fact that the claimant recovers less than one hundred dollars in the lower court is immaterial, so far as attorneys' fees are concerned, as attorneys' fees are recoverable even if the amount of the judgment is less than one hundred dollars; and the attorneys' fees are a part of the recovery and a lien upon the property: *Shaw v. Johnston*, 17 Idaho 676, 107 Pac. Rep. 399.

¹⁷ **Oregon.** Where the claimant proves by uncontradicted testimony that a certain amount is a reasonable allowance for attorneys' fees on foreclosure of the lien, he may recover the amount so proved: *McInnis v. Buchanan*, 53 Oreg. 229, 99 Pac. Rep. 929, 932.

¹⁸ **Montana.** *Neuman v. Grant*, 36 Mont. 77, 92 Pac. Rep. 43 (also for abstract of title).

¹⁹ **Washington.** Where court fixes attorneys' fees, without evidence, according to stipulation, appellate court can not say that there was an abuse of discretion, in the absence of any evidence upon the subject: *Housekeeper v. Livingstone*, 48 Wash. 217, 218.

²⁰ See § 991, this Supplement, post.

§ 947. Same. When owner not liable for attorneys' fees.
Additional matter to foot-note 37.²¹

²¹ **New Mexico.** But see *Baldrige v. Morgan* (N. M.), 106 Pac. Rep. 342, 344.

CHAPTER XLIV.

SALE AND REDEMPTION.

§ 948. Sale. In general.

Additional matter to foot-note 1.¹

§ 949. Same. Manner of executing judgment. Execution as to personal judgment against the original contractor may be levied on all debts owing from the owner to the original contractor; and where the original contractor obtains judgment against the owner, such judgment may be levied upon by subclaimants who fail to establish their liens and obtain only personal judgments against the original contractor.²

Additional matter to foot-note 4.³

§ 950. Same. "Writ" not an "execution."

Additional matter to foot-note 7.⁴

¹ California. As to sale on foreclosure of mortgage—void sale—sale en masse: See *Bechtel v. Wier*, 152 Cal. 443, 93 Pac. Rep. 75.

Defective certificate of sale, on foreclosure of mortgage: *Driscoll v. Hershey*, 7 Cal. App. 738, 95 Pac. Rep. 1040.

New Mexico. Injunction against sale: See *Robertson v. Mine & S. S. Co.* (N. M.), 110 Pac. Rep. 1037.

Oklahoma. See *Alberti v. Moore*, 20 Okl. 78, 93 Pac. Rep. 543, 547.

Oregon. See *Washburn v. Intermountain M. Co.* (Oreg.), 109 Pac. Rep. 382, 386.

Utah. Description of land in order of sale: See *Park City M. Co. v. Comstock S. M. Co.* (Utah), 103 Pac. 254, 261.

² California. *Nordstrom v. Corona City W. Co.*, 155 Cal. 206, 100 Pac. Rep. 242.

³ Idaho. Issuance of execution under section 4475, Rev. Codes, in case of death of the judgment debtor, applied in action to foreclose defendant's lien: *Rose v. Dunbar* (Idaho), 115 Pac. Rep. 920.

Idaho. Deficiency judgment; execution and return of sale: See *Naylor & Norlin v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 722, 95 Pac. Rep. 827, 96 Pac. Rep. 573.

⁴ California. Proceedings supplementary to execution on behalf of sublien claimants against lienor for indebtedness to the original contractor: See *Nordstrom v. Corona City W. Co.*, 155 Cal. 206, 209, 100 Pac. Rep. 242.

§ 951. Same. Time of sale.

Additional matter to foot-note 9.⁵

§ 952. Same. Application of proceeds to junior executions.

Additional matter to foot-note 11.⁶

Additional matter to foot-note 12.⁷

§ 953. Same. Sale of leasehold interest.

Additional matter to foot-note 14.⁸

§ 954. Right of redemption.

Additional matter to foot-note 16.⁹

§ 955. Same. Redemption by subsequent mortgagee not made a party.

Additional matter to foot-note 17.¹⁰

⁵ **Colorado.** See, generally, *La Fitte v. Salisbury*, 43 Colo. 348, 95 Pac. Rep. 1065.

Idaho. As to return: See *Naylor & Norlin v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 722, 95 Pac. Rep. 827, 96 Pac. Rep. 573.

⁶ **California.** Compare *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

⁷ **Washington.** *Purchaser at foreclosure of mechanic's lien takes property cum onere*: *Cornellus v. Washington S. L.*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

⁸ **Idaho.** *Sale of rights of construction company of canal to reclaim land under Carey Act*: See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 792, 92 Pac. Rep. 980.

Possessory title to mining claim: *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, supra.

Montana. *Sale of structure on mine, after sale of undivided interests in mining claim and insufficient proceeds*: See *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353, 357.

Oklahoma. *Sale of interest of lessee of school lands*: See *Jarrell v. Block* 19 Okl. 467, 92 Pac. Rep. 167.

⁹ **California.** *Redemption from sale on foreclosure of mortgage*: See *Bunting v. Haskell*, 152 Cal. 426, 93 Pac. Rep. 110.

Montana. *Right to redeem where mortgagor has conveyed the mortgagee*: See *Gassert v. Strong*, 38 Mont. 18, 98 Pac. Rep. 497, 503.

¹⁰ **Colorado.** *Action by minority stockholders to enjoin sale under execution when officers refuse to perform duty to redeem*: See *Paxton v. Heron*, 41 Colo. 147, 92 Pac. Rep. 15.

CHAPTER XLV.

APPEAL.

§ 956. Appeal. In general. Statutory provisions. An action to foreclose a mechanic's lien, being a suit in equity, under § 4, of Article VI of the constitution of California, must be appealed directly to the Supreme Court; and where the owner deposits the balance due into the lower court to be distributed to the lien holders according to the judgment of the court, it is a proceeding calling for equitable relief, and the case will be transferred from the Court of Appeal to the Supreme Court for hearing.¹

Additional matter to foot-note 1.²

§ 957. Error, how reviewed. Exclusion of evidence. In an action to foreclose mechanics' liens, objections as to the amount of the judgment cannot be reviewed upon an appeal from an order denying a motion for new trial.³

Additional matter to foot-note 7.⁴

¹ **California.** *Stockton L. Co. v. Schuler*, 7 Cal. App. 257, 94 Pac. Rep. 399.

² **Law of the case:**

California: See *Hubbard v. Lee*, 10 Cal. App. 477, 480, 102 Pac. Rep. 528; s. c., 6 Cal. App. 602, 92 Pac. Rep. 744.

New Mexico. See *Cowles v. Hagerman* (N. M.), 110 Pac. Rep. 843, 844; s. c., *Hagerman v. Cowles*, 14 N. M. 422, 94 Pac. Rep. 946.

Kansas. **Jurisdiction of Appellate Court** as to amount in controversy: See *Wichita S. & D. Co. v. Weil*, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

Montana. **Review as to credits** to be allowed owner: See *Mills v. Olsen* (Mont.), 115 Pac. Rep. 33, 35.

Washington. **Appeal not allowed on mere question of costs:** *Jensen v. Sheard*, 49 Wash. 593, 96 Pac. Rep. 2.

Equity suit to foreclose lien heard de novo in Supreme Court: *Jones v. Nelson* (Wash.), 112 Pac. Rep. 88, 89; *Pacific L. & T. Co. v. Dalley* (Wash.), 111 Pac. Rep. 869, 870.

Case tried on theory of authority of agent not viewed otherwise on appeal: *Driver v. Galland*, 58 Wash. 62, 109 Pac. Rep. 593, 595.

³ **California.** *Rockwell v. Light*, 6 Cal. App. 563, 566, 92 Pac. Rep. 649.

⁴ **California.** **Bill of exceptions, requisites:** See *Coghlan v. Quarataro*, (Cal. App.), 115 Pac. Rep. 664.

§ 958. Same. Writ of review.

Additional matter to foot-note 8.⁵

§ 959. Parties to appeal.

Additional matter to foot-note 10.⁶

§ 960. Same. Definition of adverse party.

Additional matter to foot-note 11.¹¹

**§ 961. Same. Appeal from judgment denying lien.
Death of one personally liable.¹²****§ 962. Notice of appeal.¹³ Contents. Sale of property.****§ 963. Same. Personal judgment against contractor.¹⁴****§ 964. Same. Upon whom served.¹⁵**

Additional matter to foot-note 17.¹⁶

Colorado. Appellate Court will not entertain error at instance of trustee in bankruptcy for voluntary payment of mechanic's lien judgment: See *Hawthorne v. Hendrie & Bolthoff Mfg. & S. Co.* (Colo. Sup.), 116 Pac. Rep. 122, 125.

⁵ **Colorado.** Question of mere right to lien, whether considered on appeal or on error: See *Rice v. Rhone* (Colo.), 111 Pac. Rep. 585.

¹⁰ **California.** Compare *Danaldson v. Orchard C. O. Co.*, 6 Cal. App. 641, 92 Pac. Rep. 1046.

Oklahoma. See *Jones v. Balsley*, 25 Okl. 344, 106 Pac. Rep. 830, 111 Pac. Rep. 942.

Washington. See *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 97 Pac. Rep. 464, 96 Pac. Rep. 158.

¹¹ **California.** Compare as to prior mortgage: *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

Idaho. See *Naylor & Norlin v. Lewiston & S. E. E. Ry Co.*, 14 Idaho 789, 96 Pac. Rep. 573, 95 Pac. Rep. 827.

¹² See "Parties," §§ 659 et seq., this Supplement, ante.

¹³ **California.** See new and additional method of appeal, §§ 941a, 941b, 941c and §§ 953a, 953b and 953c, Code Civ. Proc. (enacted 1907).

¹⁴ See preceding note.

¹⁵ See note to § 952, ante.

¹⁶ **Idaho.** *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 13 Idaho 767, 92 Pac. Rep. 980; s. c., 14 Idaho 5, 93 Pac. Rep. 789.

Montana. See *McIntyre v. Montana G. M. M. Co.*, 41 Mont. 87, 108 Pac. Rep. 353.

Oklahoma. See *Jones v. Balsley*, 25 Okl. 344, 106 Pac. Rep. 850, 111 Pac. Rep. 942.

§ 965. Same. Contractor not adverse party.¹⁷

§ 966. Same. Contractor adverse party. Default.
Additional matter to foot-note 20.¹⁸

§ 967. Same. Subsequent mortgagee. Injuriously affected. Where a mortgage debt is not yet due and is subsequent or prior to all the mechanics' liens on the property, and the mortgagee does not appeal, the mortgagors who are defendants in the mechanics'-lien actions on their appeal may object to that part of the decree ordering payment of the mortgaged debt for the reason that the mortgagor might be injured by such decree, as a deficiency judgment might be entered by a premature sale of the land.¹⁹

§ 968. Same. Beneficially affected. The time at which work of construction begins is only material for the purpose of establishing the rank of the lien claimants with reference to mortgages and similar prior liens. And where the mortgagee does not appeal from the judgment, the mortgagee alone has the right to complain as to the order in which the court directs the mortgagee's lien to be satisfied out of the proceeds of the sale of the property, except lien claimants whose liens rank subsequent thereto in the decree.²⁰

§ 969. Same. Who need not be served with notice of appeal.

Additional matter to foot-note 23.²¹

¹⁷ See note to § 962, ante.

¹⁸ **Idaho.** See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 13 Idaho 767, 92 Pac. Rep. 980; s. c., 14 Idaho 5, 93 Pac. Rep. 789.

¹⁹ **California.** *Barrett-Hicks Co. v. Glas* (Cal. App.), 111 Pac. Rep. 760, 766; s. c., 9 Cal. App. 491, 99 Pac. Rep. 956; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

²⁰ **California.** *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

²¹ **Idaho.** Likewise as to subcontractors who were made parties defendant in the action to foreclose the lien of the original contractor and who filed no pleadings, no finding nor judgment being made for or against them: *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 13 Idaho 767, 92 Pac. Rep. 980; s. c., 14 Idaho 5, 93 Pac. Rep. 789.

§ 970. Same. Service waived by stipulation.²²

§ 971. Bond for costs. Staying judgment. Lien subordinate to lien foreclosed.

Additional matter to foot-note 28.²³

§ 972. Stay bond. Lien enforced.

Additional matter to foot-note 30.²⁴

§ 973. Insufficient record.²⁵ Compliance with specifications. Void contract.²⁶

Additional matter to foot-note 31.²⁷

²² See note to § 952, ante.

²³ **Montana. Distinction between statutory undertaking and statutory bond:** See *Deer Lodge Co. v. United States F. & G. Co.* (Mont.), 112 Pac. Rep. 1060, 1062.

²⁴ See §§ 21 and 952, this Supplement, ante, notes.

Idaho. Stay bond: See *Naylor & Norlin v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 722, 95 Pac. Rep. 827, 828, 829, 96 Pac. Rep. 573.

²⁵ **Insufficient record:**

California. *Barrett-Hicks Co. v. Glas*, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

Idaho. Insufficient record: As to disposition of demurred and order overruling motion for new trial: *Naylor & Norlin v. Lewiston & S. E. E. Ry. Co.*, 14 Idaho 789, 96 Pac. Rep. 573, 575, 95 Pac. Rep. 827.

Wyoming. Record on appeal: See *Greenawalt v. Natrona I. Co.*, 16 Wyo. 226, 92 Pac. Rep. 1008.

²⁶ **California.** The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amnds. 1911, pp. 1313, et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

²⁷ **California.** *Beck v. Schmidt*, 13 Cal. App. 448, 110 Pac. Rep. 455, 456.

Colorado. Long and complicated account should be stated by lower court or referee; otherwise judgment will be affirmed: *Stubbs v. Montezuma L. Co.*, 45 Colo. 219, 100 Pac. Rep. 433; *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 921.

New Mexico. Insufficient record: As to terms, time given and conditions of contract; Claim of lien held sufficient on appeal: *Gray v. New Mexico P. S. Co.*, (N. M.), 110 Pac. Rep. 603, 604.

Washington. Refusal to review testimony as to amount due and amount of labor and materials furnished: See *Cornelius v. Washington S. Laundry*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

Time of filing proposed statement of fact: See *Owen v. Casey*, 43 Wash. 673, 94 Pac. Rep. 473.

§ 974. Presumptions on appeal.²⁸ In general.

Additional matter to foot-note 32.²⁹

§ 975. Same. Extent of land.³⁰

§ 976. Same. Support of findings. Where findings are not attacked by any specification of insufficiency of evidence to support them, such evidence will be presumed to have been introduced.³¹ The findings of the trial court are to receive such construction as will uphold rather than defeat the judgment.³²

Additional matter to foot-note 35.³³

§ 977. Same. For what work amount found due.

Additional matter to foot-note 38.³⁴

§ 978. Same. What not presumed on appeal.³⁵

§ 979. What not involved. Validity of deficiency judgment against contractor. Appeal by owner.

²⁸ Presumption:

Montana. Presumption that all contested questions of fact were decided in respondent's favor where appellate court can not ascertain how lower court arrived at amount awarded to claimant: *Mills v. Olsen* (Mont.), 115 Pac. Rep. 33, 35.

Washington. Presumption as to deposit into court being unconditional: See *Ferdig v. Simpson*, 47 Wash. 475, 92 Pac. Rep. 370.

²⁹ Washington. Presumption that there was no abuse of discretion: *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. Rep. 843, 844.

³⁰ See §§ 438 et seq., this Supplement, ante.

³¹ **California.** *Hill v. Clark*, 7 Cal. App. 609, 612, 95 Pac. Rep. 382.

³² **California.** *Pacific L. Co. v. Willson*, 6 Cal. App. 561, 562, 92 Pac. Rep. 654.

³³ **California.** *C. Scheerer & Co. v. Deming*, 154 Cal. 138, 143, 97 Pac. Rep. 155. See *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 118, 97 Pac. Rep. 152. Compare *Western L. & M. Co. v. Merchants' A. Co.*, 13 Cal. App. 4, 108 Pac. Rep. 891, 894; *Reed v. Harshall*, 12 Cal. App. 697, 108 Pac. Rep. 719.

Oregon. Suit to foreclose tried *de novo*; findings of lower court, if considered at all, are merely advisory: *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533.

Washington. As to attorneys' fees: *Housekeeper v. Livingstone*, 48 Wash. 209, 93 Pac. Rep. 217, 218.

³⁴ See "Findings," §§ 885 et seq., this Supplement, ante.

³⁵ Compare "Presumptions," § 974, ante.

Additional matter to foot-note 42.³⁶

§ 980. Findings. When objections not considered.

Additional matter to foot-note 43.³⁷

Additional matter to foot-note 44.³⁸

Additional matter to foot-note 45.³⁹

§ 981. Same. On appeal from order denying motion for new trial.⁴⁰

³⁶ **Colorado.** As to failure to request finding: See *Ross M. & M. Co. v. Sethman* (Colo.), 114 Pac. Rep. 287.

³⁷ **Arizona.** *Bank of Arizona v. Thomas Haverty Co.* (Ariz.), 115 Pac. Rep. 73, 75.

California. *Boyd v. Bargagliotti*, 12 Cal. App. 228, 243, 107 Pac. Rep. 150; *Barber A. P. Co. v. Santa Barbara I. Co.*, 13 Cal. App. 597, 110 Pac. Rep. 463, 464; *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. Rep. 157; *Hill v. Clark*, 7 Cal. App. 609, 611, 95 Pac. Rep. 382; *Hubbard v. Lee*, 6 Cal. App. 602, 607, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528. See *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 117, 97 Pac. Rep. 152; *Stimson M. Co. v. Hughes Mfg. Co.*, 5 Cal. App. 559, 97 Pac. Rep. 322.

Colorado. *Ross M. & M. Co. v. Sethman* (Colo.), 114 Pac. Rep. 287; *Foley v. Coon*, 41 Colo. 432, 98 Pac. Rep. 13, 14; *Gillett v. Young*, 45 Colo. 562, 101 Pac. Rep. 766; *Hottel v. Poudre Valley R. Co.*, 41 Colo. 370, 92 Pac. Rep. 918, 919.

Idaho. *Steltz v. Armory Co.*, 15 Idaho 551, 99 Pac. Rep. 98, 99; *Valley L. Co. v. Driessel*, 13 Idaho 662, 93 Pac. Rep. 765, 771.

Construction of findings: *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 796, 92 Pac. Rep. 980.

See § 885, this Supplement, ante.

Nevada. *Tonopah L. Co. v. Nevada A. Co.*, 13 Nev. 445, 97 Pac. Rep. 636, 638.

Oklahoma. *Standard L. Co. v. Miller & Vidor L. Co.*, 21 Okl. 617, 96 Pac. Rep. 761, 764; *Vandenberg v. P. T. Walton L. Co.*, 19 Okl. 169, 92 Pac. Rep. 149.

Washington. *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. Rep. 843, 844; *Smythe v. Lance*, 52 Wash. 560, 100 Pac. Rep. 995; *Rasmussen v. Liming*, 50 Wash. 184, 96 Pac. Rep. 1044; *Cornelius v. Washington S. Laundry*, 52 Wash. 272, 100 Pac. Rep. 727, 729; *Strandell v. Moran*, 49 Wash. 533, 95 Pac. Rep. 1106.

Where the lower court does not make a finding upon a particular issue, it is not ground of reversal where the appellant does not request such finding and where the judgment rendered is inconsistent with any other theory than that the court did so find: *Cornelius v. Washington S. Laundry*, 52 Wash. 272, 100 Pac. Rep. 727, 729.

³⁸ **California.** As to contractor being delayed in his work by the architect of the owner: *Seebach v. Kuhn*, 9 Cal. App. 485, 490, 99 Pac. Rep. 723.

Oregon. But see, contra: *Edmunds v. Welling* (Oreg.), 110 Pac. Rep. 533.

³⁹ **California.** *Robison v. Mitchell* (Cal. Sup.), 114 Pac. Rep. 984, 989.

⁴⁰ See "New Trial," § 877, this Supplement, ante.

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§ 982. Same. Who can not attack findings.⁴¹ General creditors.

§ 983. Harmless error. Appellant can not complain of a conclusion of law as not supported by the findings of fact when such conclusion is in his favor.⁴² When a question is excluded and the witness has already given in his testimony the elements from which the answer to the main question is deducible, it is not reversible error.³³

Additional matter to foot-note 48.⁴⁴

Additional matter to foot-note 49.⁴⁵

§ 984. Same. Sufficiency of claim of lien.

Additional matter to foot-note 51.⁴⁶

§ 985. Objecting on appeal for first time. Contract not entirely filed.

Additional matter to foot-note 52.⁴⁷

⁴¹ See "Findings," §§ 885 et seq., this Supplement, ante.

⁴² California. Dahlberg v. Girsch, 157 Cal. 324, 332, 107 Pac. Rep. 616.

⁴³ California. C. Scheerer & Co. v. Deming, 154 Cal. 138, 143, 97 Pac. Rep. 155.

⁴⁴ California. Where no issue is presented as to the amount of liquidated damages provided in the contract or claimed on account thereof, and the court finds that the contract is substantially completed, there is no room for inquiry as to the damages, and evidence improperly excluded as to damages is not prejudicial: Hill v. Clark, 7 Cal. App. 609, 612, 95 Pac. Rep. 382.

California. As to use of teams and drivers: See San Francisco T. Co. v. Gray, 11 Cal. App. 314, 104 Pac. Rep. 999.

As to overruling demurrer: Bacigalupi v. Phoenix B. & C. Co. (Cal. App.), 112 Pac. Rep. 892.

Colorado. Hottel v. Poudre Valley R. Co., 41 Colo. 370, 92 Pac. Rep. 918, 920.

Idaho. As to admission of evidence; general rules: Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 799, 92 Pac. Rep. 980.

Washington. As to overruling demurrer: Dickerman v. Reeder (Wash.), 109 Pac. Rep. 1060.

⁴⁵ California. Barrett-Hicks Co. v. Glas, 99 Pac. Rep. 857, 861; s. c., 9 Cal. App. 491, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. Burnett v. Glas, 154 Cal. 249, 97 Pac. Rep. 423.

⁴⁶ Washington. Under statute allowing amendment of lien notice, same deemed amended in appellate court to promote substantial justice: Cornelius v. Washington S. Laundry, 52 Wash. 272, 100 Pac. Rep. 727, 729.

⁴⁷ California. As to estoppel: Hubbard v. Lee, 6 Cal. App. 602, 609, 92 Pac. Rep. 744; s. c., 10 Cal. App. 477, 102 Pac. Rep. 528. As to

§ 986. Same. Description of land.⁴⁸

§ 987. Same. Uncertainty of interest in property.

§ 988. Consolidated cases.⁴⁹ Hearing on appeal.

§ 989. Order on appeal.⁵⁰ New trial.
Additional matter to foot-note 57.⁵¹

§ 990. Same. New trial.⁵² When sustained.

§ 991. Same. Attorneys' fees.
Additional matter to foot-note 60.⁵³

modification of contract by parol: Lacy Mfg. Co. v. Los Angeles G. & E. Co., 12 Cal. App. 37, 42, 106 Pac. Rep. 413.

Colorado. As to change in cause of action by amendment: Foley v. Coon, 41 Colo. 432, 93 Pac. Rep. 13, 14.

Idaho. As to failure of foreign corporation to comply with state law: See Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 800, 92 Pac. Rep. 980.

New Mexico. See Neher v. Viviani (N. M.), 110 Pac. Rep. 695, 698.

Washington. Driver v. Galland (Wash.), 109 Pac. Rep. 593, 594.

⁴⁸ See §§ 399 et seq., this Supplement, ante.

⁴⁹ See "Consolidation," §§ 869 et seq., this Supplement, ante.

⁵⁰ Idaho. Order on appeal; findings modified: See Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho 5, 93 Pac. Rep. 789, 798, 92 Pac. Rep. 980.

⁵¹ California. See Klokke v. Raphael, 8 Cal. App. 1, 7, 96 Pac. Rep. 392.

Idaho. New trial of whole case: See Valley L. & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. Rep. 24, 27.

Kansas. Compare Wichita S. & D. Co. v. Well, 80 Kan. 606, 103 Pac. Rep. 1003, 1004.

Washington. Order on appeal: See Ilse v. Aetna I. Co., 55 Wash. 487, 104 Pac. Rep. 787.

⁵² See "New trial," § 877, this Supplement, ante.

⁵³ See §§ 935 and 940, this Supplement, ante.

Oregon. Order on appeal: Litherland v. S. Morton Cohn R. E. & I. Co., 54 Oreg. 1, 102 Pac. Rep. 303, 100 Pac. Rep. 1.

CHAPTER XLVI.

FORMS.

CONTRACTS, NOTICES, CLAIMS, COMPLAINTS, ETC.

Form No. 1. Statutory original contract. Skeleton form.Additional matter to foot-note 2.¹Additional matter to foot-note 3.²Additional matter to foot-note 4.³Additional matter to foot-note 5.⁴Additional matter to foot-note 11.⁵**Form No. 2. Building contract. Clause for working drawings.**Additional matter to foot-note 12.⁶**Form No. 3. Building contract. Clause for delays.**Additional matter to foot-note 14.⁷**Form No. 4. Building contract. Clause for certificates of architect as to payments.**Additional matter to foot-note 15.⁸

¹ **California.** The Statutory Original Contract was abolished by Amendment of May 1, 1911, to § 1183, Code Civ. Proc. (Stats. and Amdts. 1911, pp. 1313 et seq.).

See §§ 258, 269, 274, 281, 288 and 328, this Supplement, ante.

Clause similar to paragraph "Third" but not mentioning times of payments, construed: *Hettinger v. Thiele* (Cal. App.), 113 Pac. Rep. 121.

² **Washington.** Form of contract for sinking of wells to supply a municipality, construed: See *Green v. City of Ballard*, 51 Wash. 149, 98 Pac. Rep. 95.

³ **Oregon.** "Good and workmanlike manner" construed: *Holland v. Rhoades* (Oreg.), 106 Pac. Rep. 779.

⁴ **California.** Clause construed: *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892, 895.

⁵ **Idaho.** As to withholding money: See *Rathbun v. State*, 15 Idaho, 273, 97 Pac. Rep. 335.

⁶ **Washington.** Clause as to work under direction of architect: See *Sweatt v. Bonne* (Wash.), 110 Pac. Rep. 617.

⁷ **California.** As to boycott and strike: See *J. F. Parkenson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. Rep. 1027, 1035.

⁸ **California.** This form construed: See *Watson v. Alta I. Co.* 12

Form No. 7. Building contract. Clause for alterations in contract.

Additional matter to foot-note 20.⁹

Form No. 8. Building contract. Clause for written changes in contract.

Additional matter to foot-note 21.¹⁰

Form No. 9. Building contract. Clause for arbitration.

Additional matter to foot-note 23.¹¹

Form No. 10. Building contract. Clause for damages for delay by contractor.

Additional matter to foot-note 25.¹²

Additional matter to foot-note 26.¹³

Cal. App. 560, 108 Pac. Rep. 48; *Watson v. Alta I. Co.*, 12 Cal. App. 566, 108 Pac. Rep. 50; *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892, 895. See *Hettinger v. Thiele* (Cal. App.), 113 Pac. Rep. 121.

Idaho. *Estimates of work by engineer:* See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 795, 92 Pac. Rep. 980.

Washington. Clause as to payments upon certificates of the architect: See *Sweatt v. Bonne* (Wash.), 110 Pac. Rep. 617.

Clause as to auditing and certification of expense by architect, certificate conclusive, construed: *Ilse v. Aetna I. Co.*, 55 Wash. 487, 104 Pac. Rep. 787.

⁹ **California.** This clause was construed as not including changes from a one-story building to a two-story building, so far as the surety on the contractor's bond is concerned: *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 499, 99 Pac. Rep. 856, 111 Pac. Rep. 760; s. c., sub nom. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. Rep. 423.

¹⁰ **Washington.** Clause as to alterations upon written order of architect construed: See *Sweatt v. Bonne* (Wash.), 110 Pac. Rep. 617.

Montana. Provision as to extras, construed: See *Piper v. Murray* (Mont.), 115 Pac. Rep. 669, 671.

¹¹ **California.** Clause for decision of engineer to be final as to correct interpretation of contract, construed: See *City S. I. Co. v. Marysville*, 155 Cal. 419, 421, 101 Pac. Rep. 308.

Idaho. Engineer as umpire, provision construed: See *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho 5, 93 Pac. Rep. 789, 795, 92 Pac. Rep. 980.

¹² **Washington.** Clause for delay, construed: *Goss v. Northern Pacific H. Assoc.*, 50 Wash. 236, 96 Pac. Rep. 1078.

¹³ **California.** This form construed: *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892, 894.

Clause for liquidated damages: See *Boyd v. Bargagliotti*, 12 Cal. App. 228, 107 Pac. Rep. 150.

Form No. 11. Building contract. Clause for liability in case of destruction of building before completion. Owner and contractor sharing loss.

Additional matter to foot-note 27.¹⁴

Form No. 13. Building contract. Clause for inspection and approval of work.

Additional matter to foot-note 29.¹⁵

Form No. 14. Building contract. Clause for completion of building by owner, upon default of contractor.

Additional matter to foot-note 30.¹⁶

Form No. 15. Builder's non-statutory original contract.

Short form. (Agreement to build a house according to a plan annexed, material to be furnished by the owner.)¹⁷

Additional matter to foot-note 31.¹⁸

¹⁴ **California.** This form construed: *Watson v. Alta I. Co.*, 12 Cal. App. 560, 108 Pac. Rep. 48; *Watson v. Alta I. Co.*, 12 Cal. App. 561, 108 Pac. Rep. 50; *Hettinger v. Thiele* (Cal. App.), 113 Pac. Rep. 121.

First paragraph construed: See *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. Rep. 723.

¹⁵ **California.** Clause for doing work under direction of engineer in charge: See *City S. I. Co. v. Marysville*, 155 Cal. 419, 421, 101 Pac. Rep. 308.

Colorado. Specifications in contract for construction of water system relative to the powers of the engineer, construed: See *Town of Sterling v. Hurd*, 44 Colo. 436, 98 Pac. Rep. 174.

¹⁶ **California.** This form construed: *Bacigalupi v. Phoenix B. & C. Co.* (Cal. App.), 112 Pac. Rep. 892, 894; *Dahlberg v. Girsch*, 157 Cal. 324, 327, 107 Pac. Rep. 616.

Oregon. Similar form with some additional provisions construed: *McInnis v. Buchanan*, 53 Oreg. 229, 99 Pac. Rep. 929.

Washington. Substance of the form recommended for general use by the American Institute of Architects and the National Association of Builders, construed: See *Keenan v. Empire State S. Co.* (Wash.), 113 Pac. Rep. 636.

¹⁷ **California.** Clause requiring contractor to deliver free of liens: See *Klokke v. Raphael*, 8 Cal. App. 1, 96 Pac. Rep. 392.

¹⁸ Form of contract known as "Uniform contract adopted and rendered for general use by the American Institute of Architects and the National Association of Builders" referred to in *Rathbun v. State*, 15 Idaho 273, 97 Pac. Rep. 335; *Keenan v. Empire State S. Co.* (Wash.), 113 Pac. Rep. 636.

Oregon. "Good and workmanlike manner," construed: *Holland v. Rhoades* (Oreg.), 106 Pac. Rep. 779.

Form No. 16. Bond for performance of original contract.

Additional matter to foot-note 33.¹⁹

**Form No. 17. Notice of non-responsibility by owner.
Structure.**

Additional matter to foot-note 34.²⁰

**Form No. 17a. Notice of non-responsibility. Structures and
Street work.** (Under § 1192 Cal. C. C. P., as amended,
Stats. and Amdts. 1911, pp. 1313 et seq.)

To All Whom It May Concern:

Notice is Hereby Given that the undersigned is the owner in fee simple absolute of the lot , piece and parcel of land hereinafter described; that the name of said owner is ————; that the nature of his title and interest is that of fee simple absolute; that said owner will not be responsible, nor will said land nor any part thereof be liable, for any improvement, construction, alteration or repair, or work or labor, or materials used, in, upon, under or about said land, or any part thereof, or the sidewalk, or street, in

Owner agreeing to provide labor and materials essential, not including the contract, so as not to delay its progress; form: See *McInnis v. Buchanan*, 53 Oreg. 229, 99 Pac. Rep. 129.

Contract for clearing right of way for railroad; form construed: See *Williams v. Mount Hood Ry. & P. Co.* (Oreg.), 110 Pac. Rep. 490, 111 Pac. Rep. 17.

Washington. Form of contract for excavating, blasting, etc., construed: *James v. Beebe* (Wash.), 109 Pac. Rep. 732.

Form of construction contract: See *Young Men's Christian Assoc. v. Gibson*, 58 Wash. 307, 108 Pac. Rep. 766, 767.

Clause in contract, contractor saving owner harmless from liens: See *Holm v. Chicago M. & P. S. Ry. Co.* (Wash.), 109 Pac. Rep. 799, 800.

¹⁹ **Colorado. Condition of bond construed with reference to furnishing of labor and materials and payments**: See *Covey v. Schiesswohl* (Colo.), 114 Pac. Rep. 292.

Washington. Bond that the contractor will replace certain portions of the work: See *City of Spokane v. Costello*, 57 Wash. 183, 106 Pac. Rep. 764.

Agreement between surety and owner for surety to complete building, owner waiving claims for damages for delay, etc., construed: *Exposition A. Co. v. Empire State S. Co.*, 49 Wash. 637, 96 Pac. Rep. 153, 97 Pac. Rep. 464.

²⁰ See § 1192 Code Civ. Proc., as amended May 1, 1911 (Stats. and Amdts. 1911, pp. 1313, et seq.).

front of or adjoining the same, nor for any improvements in connection therewith.

The following is a description of the land hereinabove referred to, to wit:

All that certain lot, piece and parcel of land situate in the City and County of San Francisco, State of California, more particularly described as follows, to wit: (here describe land).

Dated ———.

A. B.,

Owner in fee simple absolute of said described land.

Form No. 17b. Verification to foregoing notice of non-responsibility. (Form No. 17a.)

State of California, }
City and County of San Francisco. } ss.

A. B., being duly sworn, deposes and says: That he is a white male citizen of the United States, over the age of twenty-one years; that the foregoing notice is, and the facts stated therein are, true of his own knowledge; that the foregoing notice is a full, true and correct copy of the notice in writing posted in a conspicuous place upon the property described therein, on the ——— day of ———, 1911; that affiant is the ——— owner in fee simple absolute of said property; and that said foregoing copy of said notice and said notice posted as aforesaid contain a description of the property affected thereby sufficient for identification, with the name, and the nature of the title and interest of the person giving the same.

A. B.

Subscribed and sworn to before me this ——— day of ———, 1911.

(Seal) C. D.,

Notary Public in and for the City and County of San Francisco, State of California.

Form No. 20. Notice to owner of furnishing materials or performing labor.

Additional matter to foot-note 36.²¹

Form No. 31. Release of lien.

Additional matter to foot-note 48.²²

Form No. 32. Complaint for foreclosure of lien. Original contractor, under non-statutory original contract.

Additional matter to foot-note 49.²³

²¹ **California.** In this form strike out the clause "including counsel fees," the same being held unconstitutional.

Washington. Notice to municipality; form construed: Strandell v. Moran, 49 Wash. 533, 95 Pac. Rep. 1106.

Notice to school district: Cascade L. Co. v. Aetna I. Co., 56 Wash. 503, 106 Pac. Rep. 158; Minneapolis S. & M. Co. v. Aetna I. Co., 56 Wash. 699, 106 Pac. Rep. 160.

²² **Washington.** Release of lien; form construed: Seattle L. Co. v. Cutler (Wash.), 116 Pac. Rep. 1.

²³ **California.** Tender in answer by owner, construed: Los Angeles P. B. Co. v. Higgins, 8 Cal. App. 514, 521, 97 Pac. Rep. 414, 420.

Montana. Form of complaint to foreclose the lien for constructing cistern: See Neuman v. Grant, 36 Mont. 77, 92 Pac. Rep. 43.

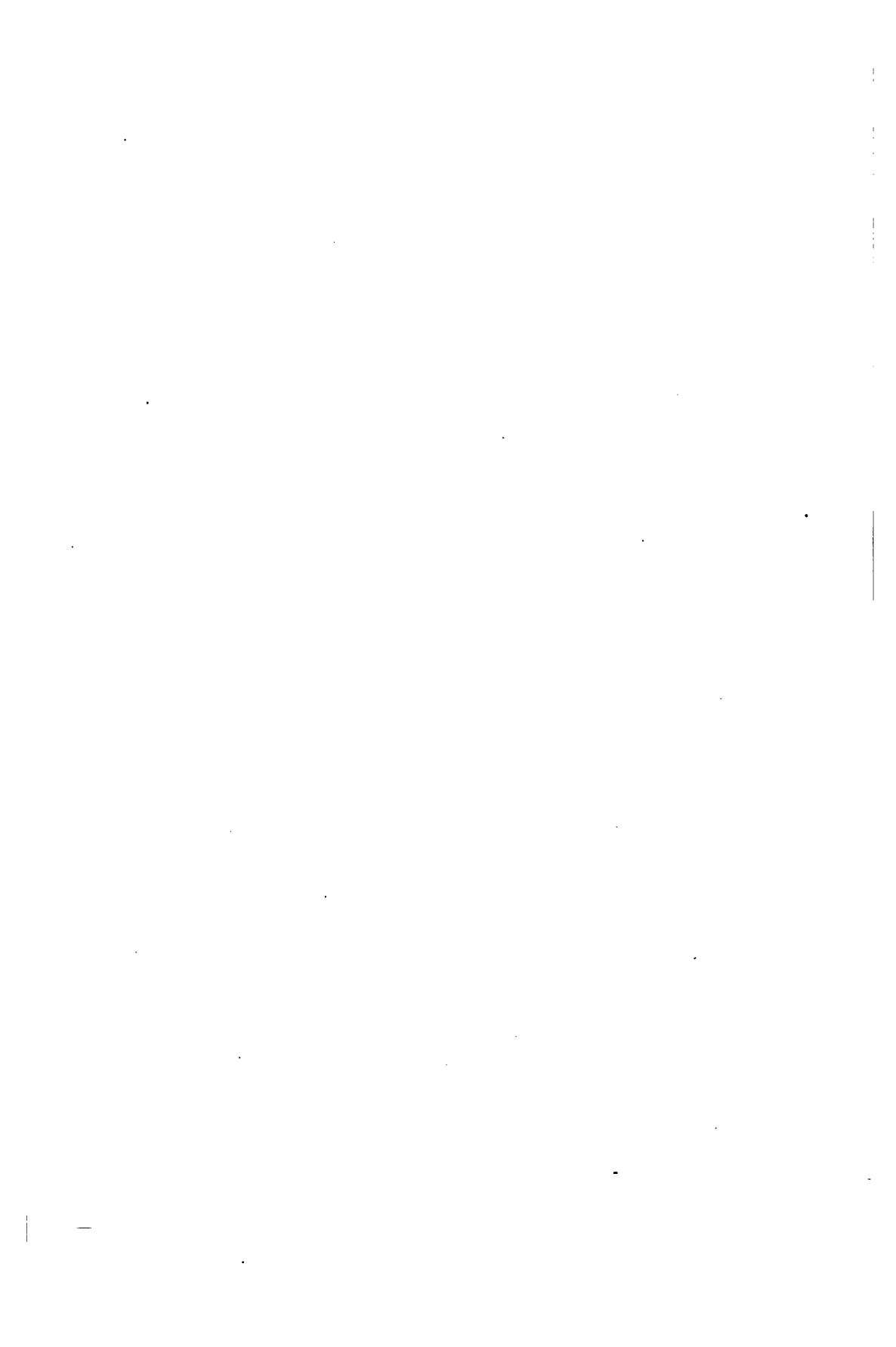


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OF
AMENDED SECTIONS AND COMPARATIVE
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CHAPTER XII.

LIENS ON STRUCTURES, MACHINERY AND LAND.

Lord's Oreg. Laws.	B. & C.	H.
§ 7416	§ 5640	§ 3669
§ 7417	§ 5641	§ 3670
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§ 7450		L. 1907 C. 152, § 7

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TITLE VIII, CHAPTER III.

[Remington & Ballinger's Ann. Codes & Stats.]

LIENS OF MECHANICS AND MATERIAL-MEN.

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§ 6105	§ 1132
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§ 6117	§ 1145
§ 6118	§ 1146
§ 6119	§ 1147
§ 6120	§ 1148
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§ 3816	§ 2906
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APPENDIX

CALIFORNIA LIEN LAW

As Amended by Chapter 681, Statutes and Amendments 1911,
Pages 1313 et seq., Approved May 1, 1911; in Effect
Sixty Days From and After May 1, 1911.

FULLY ANNOTATED, BY REFERENCES TO TREATISE AND SUPPLEMENT.

INTRODUCTORY NOTE.

While much might be written in a speculative way relative to the construction which should be given to the California mechanics' lien law of 1911, in anticipation of the decisions of the courts, the writer has preferred to simply bind the new code sections into his work by numerous references to the Treatise and Supplement. The previous rulings of the appellate courts of California and of the Western States are thus promptly brought to bear upon any particular clause under consideration. Throughout the Supplement, also, references have been made to changes in the various provisions.

The author of the bill originally introduced, the late Alexander G. Eells, Esq., and those who supported it, evidently looked forward to a greater clarity in the statute and a more adequate protection for those for whose benefit the law was intended. In the process of legislation, however, the bill proposed was modified in a number of particulars. Those who opposed the original bill upon grounds of policy, notably Frank G. Drum, Esq., and H. U. Brandenstein, Esq., so far succeeded, that it is questionable whether the results anticipated for the original bill will be achieved in the amendments as passed. Indeed, it may even be suggested that the changes are more formal than substantial.

San Francisco, Cal., July 1, 1911.

Note: For index to code sections, see Index to Supplement, tit. California Code Sections, post.

Structures.¹
First clause.²
Persons entitled.³

§ 1183. Mechanics,⁴ material-men,⁵ contractors,⁶ sub-con-

1 Structures:

See Scope note, Treatise, § 130.

Divisions of, before amendment of 1911: See Treatise and Supplement, §§ 134-137.

2 First clause; Structures: Before amendment of 1911: See Treatise and Supplement, §§ 131-135.

Importance of fixing clause under which case falls: See Treatise and Supplement, § 136.

Structures in general: See Treatise and Supplement, § 173.

Structures enumerated in statute: See Treatise and Supplement, § 175.

Structures not enumerated in statute: See Treatise and Supplement, § 174.

Structures in mines: See Treatise and Supplement, § 191. See note 47, § 1183.

See Index, tit. "Structure."

3 Persons entitled:

See, generally, Treatise and Supplement, §§ 42-44.

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

4 Mechanics:

Definition of mechanic: See Treatise, § 110, note, page 102.

Constitutional and legislative classifications: See Treatise and Supplement, § 42.

5 Material-men: Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42; and see, generally, §§ 77-103.

Definition of material-men: See Treatise and Supplement, § 78.

Who are not material-men: See Treatise and Supplement, §§ 79 and 80.

Distinction between material-man and original contractor and sub-contractor: See Treatise and Supplement, §§ 77, 81 and 60.

Distinction between material-man and laborer: See Treatise and Supplement, § 93.

Circumstances under which a lien is given to material-man: See Treatise and Supplement §§ 82-100.

Rights of material-man: See Treatise and Supplement, § 101.

Obligations of material-man: See Treatise and Supplement, § 102.

Owner's material-man, right of action: See Treatise and Supplement, § 643.

See Index, tit. "Material-man."

6 Contractor: Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Definition of original contractor: See Treatise and Supplement, § 45.

Tests of original contractor: See Treatise and Supplement, §§ 46-59.

Distinction between original contractor and material-man: See Treatise and Supplement, §§ 60, 77, 79 and 80.

General rights of original contractor: See Treatise and Supplement, §§ 61-63.

General obligations of original contractors: See Treatise and Supplement, §§ 64, 65.

See Index, tit. "Original contractor."

tractors,⁷ artisans,⁸ architects,⁹ machinists,¹⁰ builders,¹¹ Persons entitled.

7 Subcontractors:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28-42.

Definition of "subcontractor": See Treatise and Supplement, § 66.

Different degrees of subcontractors: See Treatise and Supplement, § 67.

Distinction between subcontractor and material-man, and employee of material-man: See Treatise and Supplement, §§ 68, 77 and 81.

Distinction between subcontractor and assignee of original contractor: See Treatise and Supplement, § 69, and note, Treatise, p. 72.

General rights of subcontractors: See Treatise and Supplement, §§ 70-75.

General obligations of subcontractors: See Treatise and Supplement, § 76.

See Index, tit. "subcontractor."

8 Artisans:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Definition of artisan: See Treatise, § 110, note 8, p. 102.

Distinguished from contractor, subcontractor and material-man: See Treatise and Supplement, § 107.

General rights: See Treatise and Supplement, §§ 112-116.

General obligations: See Treatise and Supplement, §§ 117, 118.

See Index, tit. "Laborer."

9 Architects:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Definition of architect: See Treatise, § 121 and § 110, note 8, p. 102.

Regulation of architects: See Treatise and Supplement, § 122.

Rights of architects: See Treatise and Supplement, § 123.

Right of architect to lien: See Treatise and Supplement, § 124.

Powers of architect: See Treatise and Supplement, § 125.

Relation between architect and owner: See Treatise and Supplement, § 126.

Architect as agent of owner: See Treatise and Supplement, § 127.

Architect as subcontractor: See Treatise, § 128.

Obligations of architect: See Treatise and Supplement, § 129, and see duties set out in detail in §§ 129a et seq., Supplement.

Certificates of architect: See Treatise and Supplement, §§ 238-242.

Fraud of architect: See Treatise and Supplement, § 239.

See notes 8, 16, 17, 18, 19 and 20 to § 1183 with reference to performance of labor.

See Index, tit. "Architect," tit. "Certificate," tit. "Plans and Specifications."

10 Machinists:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Definition of machinist: See Treatise, § 110, note 8, p. 103.

Distinguished from contractor, subcontractor and material-man: See Treatise and Supplement, § 107.

Machine as object of labor: See Treatise and Supplement, § 180.

General rights: See Treatise and Supplement, §§ 112-116.

General obligations: See Treatise and Supplement, §§ 117, 118.

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Persons entitled. miners,¹² [teamsters¹³ and draymen,]¹⁴ and all persons¹⁵ and laborers of every class¹⁶ performing labor¹⁷ upon, [or

Machinery as fixture: See Treatise and Supplement, §§ 185-187.
See Index, tit. "Laborer," tit. "Machinery," tit. "Fixtures."

11 Builders:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Definition of builder: See Treatise, § 110, note 8, p. 102.

Distinguished from contractor: See Treatise, §§ 58 and 107.

General rights: See Treatise and Supplement, §§ 112-116.

General obligations: See Treatise and Supplement, §§ 117, 118.

See Index, tit. "Laborer," tit. "Builder."

12 Miners:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

See, also, "Second Clause," post, this section, note 65.

Definition of miner: See Treatise, § 110, note 8, p. 102.

Mining superintendent: See Treatise, § 150, note 34.

General rights: See Treatise and Supplement, §§ 112-116.

General obligations: See Treatise, §§ 117, 118.

Work in mines: See Treatise and Supplement, §§ 145-155.

See Nature of labor: Treatise and Supplement, §§ 130-165 and particularly § 165.

See Index, tit. "Laborer," tit. "Mines," tit. "Mines and Mining Claims."

13 Teamsters:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Teamster for material-man: See Treatise and Supplement, § 163, and see note 51, p. 132, Treatise.

General rights: See Treatise and Supplement, §§ 112-116.

General obligations: See Treatise and Supplement, §§ 117, 118.

See Index, tit. "Laborers."

14 Draymen:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Teaming for material-man: See Treatise, § 163.

See Teamster, note 13, this section, ante.

15 All persons performing labor:

Distinction between "laborer" and "person performing labor": See Treatise, § 104, note 4.

Distinguished from "contractor," "subcontractor" and "material-man": See Treatise and Supplement, § 107.

Do not create "intermediate lien holders": See Treatise and Supplement, § 108.

General rights: See Treatise and Supplement, §§ 112-116.

General obligations: See Treatise and Supplement, §§ 117, 118.

See, generally, "Nature of labor for which a lien is given," Treatise and Supplement, §§ 130-165.

See note 16, § 1183 C. C. P.

See Index, tit. "Laborers," tit. "Labor."

16 Laborers of every class:

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

bestowing ¹⁸ **skill** ¹⁹ **or other necessary services,** ²⁰ **or fur-** **Persons entitled.**
nishing ²¹ **materials** ²² **to be used** ²³ **[or consumed in** ²⁴ **or**

Distinction between laborer and person performing labor: See Treatise, § 104, note 4.

"Laborer" distinguished from "contractor," "subcontractor," and "material-man": See Treatise and Supplement, § 107.

Do not create "intermediate lien holders": See Treatise and Supplement, § 108.

General rights of laborer: See Treatise and Supplement, §§ 112-116.

General obligations of laborer: See Treatise and Supplement, §§ 117, 118.

See General nature of labor for which lien is given: Treatise and Supplement, §§ 130-165.

See Index, tit. "Laborers," tit. "Labor."

17 Performing labor:

Classes of labor for which a lien is given: See Treatise and Supplement, §§ 130-134.

Distinction between "performing labor" and "furnishing labor": See Treatise, § 138, note 7, p. 117.

Distinction between "labor performed" and "labor bestowed": See Treatise, § 138.

See General nature of labor: Treatise and Supplement, §§ 130-165.

18 Definition of "bestowed": See Treatise, § 138.

19 Skill; definition:

Standard dictionary:

1. "The familiar knowledge of any science, art, or handicraft, with corresponding readiness and dexterity in execution or performance or in the application of science, art, or knowledge in general to practical purposes; practical efficiency; dexterity."

20 Other necessary services: See, generally, "labor for which a lien is given," Treatise and Supplement, §§ 130-165.

21 Furnishing:

When materials are "furnished": See Treatise and Supplement, § 88.

22 Materials:

Distinction between labor contract and contract for material: See Treatise and Supplement, §§ 59, 80 and 83.

Nature of materials, when lien allowed and when not: See, generally, Treatise and Supplement, §§ 87-91.

Package of material: See Treatise and Supplement, § 90.

Carriage charges: See Treatise and Supplement, § 91.

See Index, tit. "Materials," tit. "Material-man."

23 Use of materials:

Contract for use of materials: See Treatise and Supplement, § 82.

General essentials: See Treatise and Supplement, § 86.

Nature and manner of use of materials: See Treatise and Supplement, § 87.

Materials, how used: See Treatise and Supplement, § 89.

See Index tit. "Materials," tit. "Material-man," and tit. "Use of Materials."

24 Consumed:

Materials consumed: See Treatise and Supplement, § 89.

Powder consumed: See Treatise and Supplement, § 90.

See Index, tit. "Materials."

furnishing appliances,²⁵ teams²⁶ and power²⁷ contributing²⁸ to] the construction,³⁰ alteration,³¹ addition to³² or repair³³
Nature of work.²⁹
Object of labor.³⁴ either in whole or in part, of any building,³⁵ wharf,³⁶

25 Furnishing appliances:

Various appliances enumerated: See Treatise and Supplement, § 89.

26 Teams:

Definition: See Supplement, § 91, note.

Teaming for material-man: See Treatise and Supplement, § 163.

Cartage charges: See Treatise and Supplement, § 91.

See notes 13 and 14 and 25, this section.

27 Power:

See, generally, Treatise and Supplement, §§ 86-89.

28 Contributing:

See "Labor for which a lien is not given": Treatise and Supplement, § 161.

Preliminary work: See Treatise and Supplement, § 162.

See, generally, Treatise and Supplement, §§ 86-89.

See notes 25, 26 and 27, *supra*, this section.

29 Labor for which a lien is given: See, generally, Treatise and Supplement, §§ 130-165.

See notes 25-28, *supra*, this section.

30 Construction: See, generally, Treatise and Supplement, §§ 144, 145, and 148.

Construction of mine: See Treatise and Supplement, § 150.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

31 Alteration:

Character of alteration: See Treatise and Supplement, § 146.

Distinction between alteration and repair: See Treatise and Supplement, § 147.

Distinction between alteration and erection: See Treatise and Supplement, § 148.

See, generally, Treatise and Supplement, §§ 144, 145.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

See notes 30, 32 and 33, § 1183.

See Index, tit. "Alterations."

32 Addition to:

See Treatise and Supplement, § 144.

Construction of contracts as to "addition": See Treatise and Supplement, § 220.

See notes, 30, 31, and 33, § 1183, C. C. P.

33 Repair:

Distinction between alteration and repair: See Treatise, § 147.

See, generally, Treatise, §§ 144 and 145.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

See notes 30, 31 and 32, § 1183, C. C. P.

34 Object of labor:

See, generally, Treatise and Supplement, §§ 166-192.

35 Building:

Variable use of term: See Treatise, § 170, note 9.

See, generally, Treatise and Supplement, §§ 174 and 175.

Ditch not a building: See Treatise, § 177.

bridge,³⁷ ditch,³⁸ flume,³⁹ aqueduct,⁴⁰ well,⁴¹ tunnel,⁴² Object of labor.
fence,⁴³ machinery,⁴⁴ railroad,⁴⁵ wagon road⁴⁶ or other

Building as fixture: See Treatise, § 186.

See, generally, also, "Object on which labor must be performed":
Treatise and Supplement, §§ 166-192.

Construction of contract with reference: See Treatise, § 220.

See Index, tit. "Building."

36 Wharf:

Wharf not a bridge: See Treatise, § 176.

Ditch not a wharf: See Treatise, § 177.

See, generally, Treatise and Supplement, §§ 166-192.

37 Bridge:

Bridge not a wharf: See Treatise, § 176.

See, generally, Treatise and Supplement, §§ 166-192.

38 Ditch:

See Treatise and Supplement, § 177.

Ditch not a wharf: See Treatise, § 177.

Flume considered as a ditch: See Treatise, § 177.

Ditch not a building: See Treatise, § 177.

See, generally, Treatise and Supplement, §§ 166-192.

39 Flume:

See, generally, Treatise, § 177.

Flume considered as a ditch: See Treatise, § 177.

See, generally, Treatise and Supplement, §§ 166-192.

40 Aqueduct:

See Treatise, § 177. See, generally, Treatise and Supplement, §§ 166-192.

41 Well:

See Treatise and Supplement, § 178.

Oil well: See Treatise and Supplement, § 172.

Contract to bore well holes, construed: See Treatise, § 220.

Water well: See Treatise, § 705.

Appurtenances to well: See Treatise, § 440, note 7.

See, generally, Treatise and Supplement, §§ 166-192.

42 Tunnel:

Tunnel in mine: See Treatise, §§ 153 and 179.

Tunnel to develop water: See Treatise, § 179, note 35, p. 143.

Contract to timber tunnel construed: See Treatise, § 220.

See, generally, Treatise and Supplement, §§ 166-192.

43 Compare Treatise and Supplement, § 174.

44 Machinery:

Object of labor, generally: See Treatise and Supplement, §§ 166-192.

Work upon machinery as a fixture: See Treatise and Supplement,
§§ 95, 180, 174, 185, 772, 447.

Contract to furnish certain machinery: See Treatise, § 228, note,
p. 177.

Machine in mine and mining claims: See Treatise and Supplement,
§§ 191, 445, 451.

Lien for repairing machinery on mine: See Treatise, § 150.

45 Railroad:

Railroad and railway as structure: See Treatise and Supplement,
§ 181.

Extent of lien on railroads: See Treatise and Supplement, §§ 447,
449 and 181.

Extent of lien.⁴⁶

structure,⁴⁷ shall have a lien⁴⁸ upon the property⁴⁹ upon which they have bestowed labor or furnished materials, for the value⁵¹ of such labor done and materials furnished [and

Application of mechanics' lien to railroad: See Treatise and Supplement, §§ 369, 447 and 403.

Description in case of mechanics' lien: See Treatise, § 405.

Tramway on mining claim: See Treatise, § 174.

See, generally, Treatise and Supplement, §§ 166-192.

See Index, tit. "Railroads."

46 Wagon road:

See Treatise, § 149, note 29, p. 122.

47 "Other structure":

Other structures not enumerated in statute, generally: See Treatise and Supplement, § 174.

Boarding house on mining claim: See Treatise, § 174.

Ice-room, attached to warehouse: See Treatise, § 174.

Pipe line for irrigation company: See Treatise, § 174.

Poles set in ground for electric line: See Treatise, § 174.

Reduction-works upon mine, and stamp mill: See Treatise, § 174.

Swings between upright posts: See Treatise, § 174.

See notes 1 and 2, § 1183, C. C. P., ante.

See Index, tit. "Structures."

48 Lien:

Definition of Lien: Treatise, § 362.

Classification of mechanics' liens: See Treatise and Supplement, §§ 10-17.

Theory of the law: See Treatise and Supplement, § 6.

Kinship between statutes of different states: See Treatise and Supplement, § 18.

General peculiarities of mechanics' liens: See Treatise and Supplement, §§ 19-23.

See Index, tit. "Liens."

49 Property:

Distinguished from object of labor: See Treatise and Supplement, §§ 166, 167.

Description of property in claim: See Treatise and Supplement, §§ 399-407.

Territorial extent of lien: See Treatise and Supplement, §§ 438-451.

Estates and interests subject to lien: See Treatise and Supplement, §§ 459-485.

See Index, tit. "Property," tit. "Description of property to be charged."

50 Extent of lien:

Territorial extent: See Treatise, §§ 446-448.

Property viewed as an entirety: See Treatise, §§ 447-451.

Lien as limited by contract: See Treatise, §§ 452-458.

Estates and interests subject to lien, by contract: See Treatise and Supplement, §§ 459-468.

Estates and interests subject to lien, by estoppel: See Treatise and Supplement, §§ 469-485.

Priorities: See Treatise and Supplement, §§ 486-507.

See Index, tit. "Extent of lien," tit. "Limitation on liens."

51 Value of labor and materials:

for the value of the use of such appliances, teams or power], whether at the instance of the owner,⁵² or of any other person acting by his authority or under him,⁵⁴ as contractor or otherwise,⁵⁵ and [every contractor,⁵⁶ sub-contractor,⁵⁷

Agency for owner.⁵³

Construction of, as used in statutes: See Treatise and Supplement, § 456.

Current price as evidence of value: See Treatise, § 833.

Other evidence of value: See Treatise, § 834.

Contract as evidence of value: See Treatise and Supplement, §§ 829-833.

Statement of claim showing value: See Treatise, § 390, note 123.

See Index, tit. "Value."

52 Owner:

See, generally, Treatise and Supplement, §§ 508-571.

General rights of owner and employer: See Treatise and Supplement, §§ 510-522.

General obligations of owner: See Treatise, §§ 523-546.

Owner and reputed owner: See Treatise and Supplement, § 509.

Liability of owner upon statutory notice to withhold: See Treatise and Supplement, §§ 547-571.

See Index, tit. "Owner," tit. "Owner, Employer or Person Causing Improvement."

53 Agency for owner:

See, generally, Treatise and Supplement, §§ 572-584.

Husband as agent of wife: See Treatise and Supplement, § 572.

Wife as agent of husband: See Treatise and Supplement, § 572.

See Index, tit. "Agency," tit. "Agent."

54 "Acting by his authority or under him":

Agency, actual and ostensible: See Treatise and Supplement, § 572.

Agency by statutory estoppel: See Treatise and Supplement, §§ 573-576.

Persons in possession as agent of the owner: See Treatise and Supplement, §§ 577, 578.

See Index, tit. "Agency," tit. "Agent."

55 "As contractor or otherwise":

See "Agency," generally, Treatise and Supplement, §§ 572-584.

As to contractor, see note 6, this section, ante.

Contractor as agent: See note 56, this section, post.

Person in possession as agent of the owner: See Treatise and Supplement, § 575.

As to vendee in possession: See Treatise and Supplement, §§ 463, 478.

As to lessee: See Treatise and Supplement, §§ 464, 477, and 574.

As to unauthorized trustee: See Treatise, § 465.

See note 60, this section, post.

See Index, tit. "Agent," tit. "Agency," tit. "Contractor," tit. "Original Contractor."

56 Contractor:

Contractor as agent: See note 55, this section, ante.

See contractor, generally, note 6, this section, ante.

Contractor as statutory agent of the owner: See Treatise and Supplement, §§ 574 and 697.

See "Agency," generally: Treatise and Supplement, §§ 572-584.

See Index, tit. "Agent," tit. "Agency," tit. "Original Contractor."

Agency for owner. and architect,⁵⁸ builder⁵⁹ or other person having charge⁶⁰ of the construction, alteration, addition to or repair⁶¹ either in whole or in part of any building,⁶² or other improvement⁶³ as aforesaid shall be held to be the agent⁶⁴ of the owner for the purposes of this chapter].

57 Subcontractor:

Subcontractor as agent of owner: See note 7, this section, ante.

Subcontractor, generally: See Treatise and Supplement, §§ 66-76.

Agency: See Treatise, §§ 572-584.

See Index, tit. "Agent," tit. "Agency," tit. "Subcontractor."

58 Architect:

See note 9, this section, ante.

Architect, generally: See Treatise and Supplement, §§ 119-129, and Supplement.

Architect as agent of the owner: See Treatise and Supplement, § 579.

Agency, generally: See Treatise and Supplement, §§ 572-584.

See Index, tit. "Architect," tit. "Agent," tit. "Agency."

59 Builder: See note 11, this section, ante.

Definition of builder: See Treatise, § 110, note 8, p. 102.

Distinguished from contractor: See Treatise, §§ 58, 107.

Agency, generally: See Treatise and Supplement, §§ 572-584.

See Index, tit. "Builder," tit. "Agent," tit. "Agency."

60 Other person having charge:

See note 55, this section, ante.

Agency, generally: See Treatise and Supplement, §§ 572-584.

See Index, tit. "Vendor," tit. "Vendee," tit. "Lessor," tit. "Lessee," tit. "Agent," tit. "Agency."

61 Construction, alteration, addition to or repair:

See Nature of work, note 29, this section, ante.

Construction: See note 30, this section, ante.

Alteration: See note 31, this section, ante.

Addition to: See note 32, this section, ante.

Repairs: See note 33, this section, ante.

Labor for which lien is given, generally: See Treatise and Supplement, §§ 166-192.

See Index, tit. "Construction," tit. "Alteration," tit. "Repair," tit. "Addition to," tit. "Alteration or Repair."

62 Building:

See note 35, this section, ante.

See Index, tit. "Building."

63 Definition of "improvement": See Treatise, § 141.

Improvement distinct from the land: See Treatise, § 380.

Meaning of improvement variable as used in mechanics' lien law: See Treatise, § 171.

Object on which labor must be performed: See Treatise and Supplement, §§ 166-192, and, also, § 158.

See Index, tit. "Improvement," tit. "Structure," tit. "Object on which labor must be performed," and see specific structures.

64 Agent of owner: See §§ 53, 54, 55, 56, 57, 58, 59, and 60, this section, ante.

See Index, tit. "Agent," tit. "Agency."

Any person who performs labor⁶⁷ in any mining claim or claims,⁶⁹ or in or upon any real property worked as a mine,⁷⁰ either in the development⁷² thereof or in working thereon

Mines and Mining Claims.
Second clause.⁶⁵
Persons entitled.⁶⁶
Object of labor.⁶⁸
Nature of work.⁷¹

⁶⁵ **Mines and mining claims; Second Clause:**

Definition of mine: See Treatise and Supplement, § 183.

Labor for which a lien is given in mines: See Treatise and Supplement, §§ 132-137; §§ 149-155; § 165.

Object on which the labor must be performed in mines: See Treatise and Supplement, §§ 182-183.

Work on fixtures in mines: See Treatise and Supplement, § 191.

See Index, tit. "Mines and Mining Claims."

⁶⁶ **Persons entitled:** See notes 3-20, this section, ante.

Persons entitled in general: See Treatise and Supplement, §§ 42-44.

Liens allowed for work on mining claims: See Treatise and Supplement, § 150.

⁶⁷ **Person who performs labor:** See notes 12, 15-17, this section, ante.

Persons performing labor, generally: See Treatise and Supplement, §§ 104-118.

Nature of labor for which a lien is given in mines: See Treatise and Supplement, §§ 132-137; §§ 149-155, and § 165.

Liens allowed for work in mining claims: See Treatise and Supplement, § 150.

See Index, tit. "Mines and Mining Claims," tit. "Labor," tit. "Labor for which a lien is given," tit. "Laborer," tit. "Work."

⁶⁸ **Object of labor:** See note 34, this section, ante.

Object on which labor must be performed: See Treatise and Supplement, §§ 166-192.

See Index, tit. "Object of Labor."

⁶⁹ **Mining claim or claims:**

Definition of mining claim: See Treatise, § 182.

What not included within meaning of mining claim: See Treatise, § 182.

Oil well a mine or mining claim: See Treatise, § 182.

See Index, tit. "Mine," tit. "Mining Claims."

⁷⁰ **Real property worked as a mine:** See note 69, this section, ante.

Definition of mine: See Treatise, §§ 183 and 96.

See Index, tit. "Mines and Mining Claims."

⁷¹ **Nature of work:**

See note 29 as to structure, this section, ante.

See, generally, Treatise and Supplement, §§ 130, 165; particularly, §§ 132-137; §§ 149-155, and § 165.

Work on fixtures on mine: See Treatise and Supplement, § 191.

See Index, tit. "Labor for which lien is given."

⁷² **Development: Drifting not strictly alteration, addition to or repair, within statute:** See Treatise, §§ 96 and 152.

Running tunnel: See Treatise, § 153.

Shaft and other mining instrumentalities: See Treatise, § 154.

Development work, generally: See Treatise and Supplement, §§ 7, 150, and 152.

Exploration of geologist and mining expert: See Treatise, § 150.

Cleaning out tunnel: See Treatise, § 150.

See Index, tit. "Mines and Mining Claims."

Extent of lien.⁷⁷Owner actor.⁸¹Agency for
owner.

by the subtractive process ⁷³ [or furnishes materials to be used ⁷⁴ or consumed ⁷⁵ therein], has a lien⁷⁶ upon the same and the works ⁷⁸ owned and used by the owners for [mill-
ing or] reducing the ores from the same,⁷⁹ for the value ⁸⁰ of the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of such mining claim or claims or real property worked as a [mine,⁸² or] his agent,⁸³ and every contractor,⁸⁴

⁷³ Subtractive process:

See note 72, this section, ante.

Drifting: See Treatise, § 152.

Levels, chutes, stopes, uprisen, cross-cuts, inclines: See Treatise, § 154.

See Index, tit. "Mines and Mining Claims."

⁷⁴ Materials to be used in mining claims:

See Material-man, note 5, this section, ante.

Contract for use of materials: See Treatise and Supplement, § 82.

Essentials: See Treatise and Supplement, § 86.

Materials, how used: See Treatise and Supplement, §§ 89, 96.

Powder for blasting: See Treatise, § 90.

Nature of labor for which used: See Treatise and Supplement, §§ 99, 100.

See Index, tit. "Materials," tit. "material-man," tit. "mines and mining claims."

⁷⁵ See note 5, "Material-man"; note 74, "Materials to be used," this section, ante.

Consumption of material: See Treatise, § 89.

Powder: See Treatise, § 90.

Oils and fuel: See Treatise, § 89, note, p. 88.

⁷⁶ Lien: See note 48, this section.

⁷⁷ Extent of lien:

As to mine: See Treatise and Supplement, §§ 443, 444, 451.

See Index, tit. "Mines," tit. "Mines and mining claims."

⁷⁸ Upon the same and the works:

See note 77, this section.

Mill and reduction works: See Treatise, § 451, and § 444, note, p. 399.

⁷⁹ Ores from the same:

Custom mill: See Supplement, Index.

⁸⁰ For the value:

See note 51, this section, ante.

See Index, tit. "Value."

⁸¹ Owner as actor: See note 52, this section, ante.

⁸² Real property worked as a mine:

Distinction between mining claim and mine: See Treatise, § 182.

⁸³ Agency for owner:

See note 53, this section, ante.

Person working mine as agent: See Treatise, §§ 578, 696.

⁸⁴ Contractor: Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Definition of original contractor: See Treatise and Supplement, § 45.

Tests of original contractor: See Treatise and Supplement, §§ 46-59.

sub-contractor,⁸⁵ [superintendent⁸⁶ or] other person having charge of any mining or work or labor performed in and about such mining claim or claims or real property worked as a [mine, either] as lessee⁸⁷ or under a working bond or contract⁸⁸ [thereon shall] be held to be the agent⁸⁹ of the owner for the purposes of this chapter. Agency for owner.

[The liens in this chapter provided for shall be direct liens,⁹¹ and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract Nature of lien.
Extent of lien.
Contractual limitation.

Distinction between original contractor and material-man: See Treatise and Supplement, §§ 60, 77, 79 and 80.

General rights of original contractor: See Treatise and Supplement, §§ 61-63.

General obligations of original contractors: See Treatise and Supplement, §§ 64, 65.

See Index, tit. "Original contractor."

⁸⁵ **Subcontractors:**

Constitutional and legislative classifications: See Treatise and Supplement, §§ 28-42.

Definition of "subcontractor": See Treatise and Supplement, § 66.

Different degrees of subcontractors: See Treatise and Supplement, § 67.

Distinction between subcontractor and material-man, and employee of material-man: See Treatise and Supplement, §§ 68, 77 and 81.

Distinction between subcontractor and assignee of original contractor: See Treatise and Supplement, § 69, and note; Treatise, p. 72.

General rights of subcontractors: See Treatise and Supplement, §§ 70-75.

General obligations of subcontractors: See Treatise and Supplement, § 76.

See Index, tit. "Subcontractor."

⁸⁶ **Superintendent:**

Distinction between mining superintendent and superintendent of a mine: See Treatise, § 150.

⁸⁷ **Lessee of a mine:**

Lessee of mine as agent by contract: See Treatise and Supplement, §§ 464, 467, and 421.

See, also, Treatise, § 36, note, p. 43.

Lessee of mine as agent by estoppel: See Treatise and Supplement, § 477.

Notice of non-responsibility, generally: See Treatise and Supplement, §§ 469-485.

⁸⁸ **Working bond or contract:** See note 87, this section, ante.

Vendee in possession: See Treatise and Supplement, §§ 463, 477 and 478.

⁸⁹ See notes 53, 65, and 83, this section, ante.

⁹⁰ **Nature of lien:**

General nature of lien: See note 47, this section, ante.

Classifications of lien: See Treatise and Supplement, §§ 10-17.

⁹¹ **Direct lien:**

Definition: See Treatise and Supplement, §§ 10-14.

**Contractual
limitation.**

price ⁹² agreed upon between the contractor and the owner except as hereinafter provided;⁹³ but said several liens ⁹⁴ shall not in any case exceed in amount the reasonable value ⁹⁵ of the labor done or material furnished, or both, for which the lien is claimed, nor the price agreed ⁹⁶ upon for the same between the claimant and the person by whom he was employed; nor in any case, where the claimant was employed by a contractor, or sub-contractor, shall the lien extend to any labor or materials not embraced within or covered ⁹⁷ by the original contract ⁹⁸ between the contractor and the owner, or any modification ⁹⁹ thereof made by or

⁹² Limited to contract price:

Lien as limited by contract: See Treatise and Supplement, §§ 459-468; §§ 315-318.

⁹³ See following language in this section, post: "It is the intent and purpose of this section to limit the owner's liability in all cases to the measure of the contract price" when he shall have filed bond with original contract, etc. See, also, § 14 of the act of May 1, 1911 (Stats. & Amdts. 1911, pp. 1813 et seq.), post.

⁹⁴ Lien as limited by contract: See, generally, Treatise and Supplement, §§ 459-468, §§ 315-318, §§ 452-458.

⁹⁵ Reasonable value: See Treatise and Supplement, § 456.

⁹⁶ Price agreed upon: See Treatise and Supplement, § 456.

⁹⁷ Embraced within or covered:

Nature and manner of use of materials: See Treatise and Supplement, § 87.

How far subclaimants are bound by terms of original contract: See Treatise and Supplement, § 318.

⁹⁸ Original contract:

Definition of original contract: See Treatise, §§ 194, 211.

General principles applicable to building contracts: See Treatise and Supplement, §§ 193-215.

Construction of building contract: See Treatise and Supplement, §§ 216-228.

Common clauses peculiar to building contracts: See Treatise and Supplement, §§ 229-257.

Plans and Specifications: See Treatise and Supplement, §§ 309, 310, and Supplement, §§ 129a et seq.

Non-statutory original contract: See Treatise and Supplement, §§ 258-268.

Statutory original contract:

Statutory requirements not essential to the validity of the whole statutory original contract: See Treatise and Supplement, §§ 269-285.

Statutory requirements essential to the validity of statutory original contracts: See Treatise and Supplement, §§ 286-314.

Effect of validity or invalidity of statutory original contract (indirect or direct lien): See Treatise and Supplement, §§ 315-325.

Extinction of original contract: See Treatise and Supplement, §§ 326-360.

⁹⁹ Modification of original contract: See Treatise and Supplement, §§ 326-332.

See Index, tit. "Alteration," tit. "Contract."

with the consent of such owner, and of which such contract, or modification thereof the claimant shall have had actual notice ¹⁰⁰ before the performance of such labor or the furnishing of such materials. The filing of such original contract,¹⁰¹ or modification thereof, in the office of the county recorder of the county where the property is situated, before the commencement of the work,¹⁰² shall be equivalent to the giving of such actual notice by the owner to all persons performing work or furnishing materials thereunder. In case said original contract shall, before the work is commenced, be so filed, together with a bond ¹⁰³ of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent of the contract price ¹⁰⁴ named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure ¹⁰⁵ to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond ¹⁰⁶ in any suit brought to foreclose

Limitation of lien by notice.
Filing contract, notice.

Filing contract and bond as limitation.

Conditions of bond.

¹⁰⁰ Notice: See Treatise and Supplement, § 475.

¹⁰¹ Filing original contract:

Compare filing of statutory original contract: Duty, necessity and object of filing: See Treatise and Supplement, §§ 294, 296. See, also, §§ 297-311.

¹⁰² Time of filing statutory original contract: See Treatise and Supplement, § 312.

¹⁰³ Place of filing statutory original contract: See Treatise, § 313.

¹⁰⁴ Before the commencement of the work:

As to statutory original contract: See Treatise, § 312.

¹⁰⁵ Bond:

Sureties, generally: See Treatise and Supplement, §§ 605-626.

Contractor's bond: See Treatise and Supplement, §§ 281-285.

Constitutionality of bond: See Treatise, §§ 39, 281.

See Index, tit. "Bond," tit. "Bond of contractor."

¹⁰⁶ Contract price: See Treatise and Supplement, §§ 259-263.

Implied contract: See Treatise and Supplement, § 260.

Contract price computable: See Treatise, § 262.

See Index, tit. "Contract price."

¹⁰⁷ Inure: See Supplement, §§ 606, 281.

¹⁰⁸ Recovery on bond: See Treatise and Supplement, § 283.

See note 103, this section, ante.

Cumulative remedies: See Treatise and Supplement, § 638.

Restriction on recovery.

Deficiency judgment against contractor and sureties.

Modification not to release sureties.

**Intent of section.
Contractual extent of lien.**

the liens ¹⁰⁷ provided for in this chapter or in a separate suit brought on said bond, ¹⁰⁸ then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, ¹⁰⁹ and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both. ¹¹⁰ No change or alteration of the work ¹¹¹ or modification of any such contract ¹¹² between the owner and his contractor shall release or exonerate any surety or sureties upon any bond given under this section.] ¹¹³

[It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract

107 Action to foreclose lien:

Generally: See Treatise and Supplement, §§ 638-991.

Cumulative remedies: See Treatise and Supplement, §§ 638-644.

Jurisdiction over bondsman to render judgment: See Supplement, § 864.

See, generally, Treatise and Supplement, §§ 638-991.

Cumulative remedies: See Treatise and Supplement, §§ 638-644.

See Index, tit. "Remedies," tit. "Foreclosure of lien," tit. "Bond of contractor," and tit. "Bond."

108 Separate suit on bond:

See note 107, this section, ante.

See Index, tit. "Bond," tit. "Contractor's bond."

109 Amount found due contractor:

See, generally, "Indirect lien," Treatise and Supplement, §§ 10-14.

110 Deficiency judgment: See Treatise and Supplement, §§ 922-925.

What involved, and what not involved on appeal: See Treatise, § 979.

See Judgment or Decree, generally, Treatise and Supplement, §§ 903-934.

See Index, tit. "Deficiency Judgment," tit. "Judgment."

111 Alteration of work:

See, generally, Treatise and Supplement, §§ 326-332, and § 247.

See Index, tit. "Alteration," tit. "Architect," tit. "Extra work."

112 Modification of contract:

See note 100, this section, ante.

113 "Release or exonerate surety":

See note 103, this section, ante.

See, generally, Treatise and Supplement, §§ 326-332, and § 247.

Changes in contract authorized by contract: See Treatise and Supplement, § 615.

See note 87, this section, ante.

See Index, tit. "Sureties," tit. "Contractor's bond," tit. "Bond."

price ¹¹⁴ where he shall have filed or caused to be filed in good faith with his original contract a valid bond ¹¹⁵ with good and sufficient sureties ¹¹⁶ in the amount and upon the conditions as herein provided. It shall be lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond ¹¹⁷ or other security ¹¹⁸ as he may deem satisfactory.] (In effect sixty days after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

Owner's security.

§ 1183a was repealed by Stats. & Amdts. 1911, pp. 1313 et seq. (In effect sixty days after May 1, 1911).

§ 1184. Any of the persons mentioned in [the preceding section,] ¹ except the contractor, may at any time give to [the owner a notice] ² that they have performed labor or

Notice to owner to withhold.
Who may give.
Time of giving.
Contents of notice.

¹¹⁴ See note 109, this section, ante.

¹¹⁵ **Valid bond:**

Statutory bonds: See Treatise and Supplement, §§ 608-612.

Contractor's bond: Treatise and Supplement, §§ 281-285.

See Index, tit. "Bond," tit. "Contractor's bond," tit. "Surety," and tit. "Security."

¹¹⁶ **Good and sufficient sureties:** See Treatise and Supplement, §§ 606-612.

¹¹⁷ **Such bond:**

Statutory bonds: See Treatise and Supplement, §§ 608-612.

Contractor's bond: See Treatise and Supplement, §§ 281-285.

See Index, tit. "Bond," tit. "Contractor's Bond," tit. "Surety," and tit. "Security."

¹¹⁸ **Other security:**

Common law bond: See Treatise and Supplement, § 613.

Surety, generally: See Treatise and Supplement, §§ 605-626.

Waiver of lien by taking additional security: See Treatise § 630.

See Index, tit. "Surety," tit. "Security," tit. "Bond," and tit. "Contractor's bond."

§ 1184 C. C. P. ¹ **Persons mentioned:**

See "Persons entitled," note 3 to § 1183, C. C. P., ante.

² **Notice to withhold:** See, generally, Treatise and Supplement, §§ 547-571.

Historical: See Treatise, § 548.

Statutory provision: See Treatise, § 549.

Distinction between notice to owner to withhold and claim of lien: See Treatise, § 550.

Object and nature of notice: See Treatise, § 550.

Notice to owner creating personal obligation: See Treatise, § 551.

Notice to owner, garnishment: See Treatise, § 552.

Provision when applicable: See Treatise, § 553.

Service of notice on public trustees: See Treatise and Supplement, § 564.

Contents of notice.	furnished materials, or both, to the contractor or other person acting by the authority of [the owner,] or that they have agreed to do so, ³ stating ⁴ in general terms the kind of labor and materials ⁵ and the name of the person to or for whom the same was done or furnished, or both, ⁶ and the amount in value, as near as may be, of that already done or furnished, or both, ⁷ and of the whole agreed to be done or furnished, or both, ⁸ [and any of said persons who shall on the written demand of the owner refuse to give such notice shall thereby deprive himself of the right to claim a lien under this chapter]. ⁹ Such notice may be given by delivering the same to [said owner] personally, or by leaving it at his residence or place of business with some person in charge, or by delivering it to his architect, or by leaving it at [the latter's office] with some person in [charge]. ¹⁰ No such notice shall be invalid by reason of any defect in form, provided it is sufficient to inform [the owner] of the substantial
Owner may demand notice.	
Effect of refusal.	
Manner of giving notice.	
Defects.	

General rights of owner upon service of notice: See Treatise and Supplement, §§ 554-564.

Action on notice: See Treatise, § 567.

Notice, when held sufficient: See Treatise, § 571.

See Index, tit. "Notice," tit. "Notice to owner," tit. "Owner, employer or person causing improvement."

³ See Treatise, § 570.

See note 2, ante, this section.

See note 4, post, this section.

⁴ **Form and contents of notice:** See Treatise and Supplement, §§ 568-571.

Construction of notice: See Treatise, § 568.

Effect of several notices served: See Treatise, § 569.

See note 2, ante, this section.

⁵ **Kind of labor and materials:** See notes 2, 3 and 4, ante, this section.

See Treatise, § 570.

⁶ **Name of the person:**

See notes 2, 3, 4 and 5, ante, this section.

See Treatise, § 570.

⁷ **Amount already furnished:**

See notes 2-6, ante, this section.

See Treatise, § 570.

⁸ **Whole agreed to be furnished:**

See notes 2-7, ante, this section.

See Treatise, § 571.

⁹ **Forfeiture of lien:** See Treatise and Supplement, §§ 632, 633.

Waiver of lien: See Treatise and Supplement, §§ 627-631.

See Index, tit. "Forfeiture," tit. "Waiver."

¹⁰ **Time of giving notice:** See Treatise, § 565.

matters herein provided [for.¹¹ Upon] such notice being given it shall be [lawful for the owner to] withhold,¹² [and in the case of property which, for reasons of public policy or otherwise, [is] not subject to the liens in this chapter provided for,¹³ the owner or person who contracted with the contractor, shall withhold] from his contractor sufficient money due or that may become due to such [contractor to] answer such claim and any lien that may be filed [therefor including the reasonable cost of any litigation thereunder].¹⁴ (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

Rights of owner
on notice.
Public property.

§ 1185. The land¹ upon which any building,² improve-
ment,³ well⁴ or structure⁵ is constructed, together with a

Territorial
extent of lien.

¹¹ Substantial matters: See Treatise and Supplement, §§ 547-571.

¹² Lawful for owner to withhold:

General rights upon service of notice to withhold: See Treatise and Supplement, §§ 554-564; § 514.

Duty to withhold payment: See Treatise, § 525.

See Index, tit. "Notice," tit. "Notice to owner," tit. "Owner," tit. "Owner, employer or person causing improvement."

¹³ Public property:

Object of labor: See Treatise and Supplement, §§ 192, 257.

Service upon public trustees: See Treatise and Supplement, § 564.

Bond of contractor on public work: See Treatise and Supplement, § 626.

See Index, tit. "Public property," tit. "Public trustee," tit. "Public work."

¹⁴ Costs and attorney's fees:

See Treatise and Supplement, §§ 925-947.

See Index, tit. "Costs," tit. "Attorney's fees."

§ 1185 C. C. P. 1 Land:

Territorial extent of lien: See Treatise and Supplement, §§ 438-446.

2 Building:

Variable use of term: See Treatise, § 170, note 9.

See, generally, Treatise and Supplement, §§ 174, 175.

Ditch not a building: See Treatise, § 177.

Building as fixture: See Treatise, § 186.

See, generally, also, "Object on which labor must be performed":

Treatise and Supplement, §§ 166-192.

Construction of contract with reference to: See Treatise, § 220.

See Index, tit. "Building."

3 Improvement:

Definition: See Treatise, §§ 141, 171.

Distinct from land: See Treatise, § 380, note.

4 Well:

See Treatise and Supplement, § 178.

Oil well: See Treatise and Supplement, § 172.

Contract to bore well holes, construed: See Treatise, § 220.

Water-well: See Treatise, § 705.

Appurtenances to well: See Treatise, § 440, note 7.

Bloom's Sup.—22

Territorial
extent of lien.

convenient space about the same, or so much as may be required for the convenient use and occupation thereof,⁶ to be determined by the court on rendering judgment,⁷ is also subject to the lien, if at the commencement of the work, or of the furnishing of the material for the same, the land belonged to the person who caused said building, improvement, well or structure to be constructed,⁸ altered⁹ or repaired,¹⁰ but if such person owned less than fee simple estate in such land, then only his interest therein is subject

Estates or
interests subject
to lien.

See, generally, Treatise and Supplement, §§ 166-192.

⁵ **First clause; Structures:** Before amendment of 1911: See Treatise and Supplement, §§ 131-135.

Importance of fixing clause under which case falls: See Treatise and Supplement, § 136.

Structures in general: See Treatise and Supplement, § 173.

Structures enumerated in statute: See Treatise and Supplement, § 175.

Structures not enumerated in statute: See Treatise and Supplement, § 174.

Structures in mines: See Treatise and Supplement, § 191.

See note 47, § 1183.

See Index, tit. "Structure."

⁶ **Land for convenient use and occupation; generally:** See Treatise and Supplement, §§ 440, 441.

Evidence as to extent of land necessary: See Treatise and Supplement, § 769.

Finding as to land necessary: See Treatise, § 885, note.

Allegation of complaint as to land necessary: See Treatise, § 718.

Decree as to land necessary: See Treatise, § 934.

See Index, tit. "Convenient use and occupation."

⁷ **Judgment:**

See Treatise, § 934.

Judgment, generally: See Treatise and Supplement, §§ 903-934.

⁸ **Constructed:**

See, generally, Treatise and Supplement, §§ 144, 145, 148.

Construction of mine: See Treatise and Supplement, § 150.

See "General nature of labor for which a lien is given": Treatise and Supplement, §§ 130-165.

⁹ **Altered:**

Character of alteration: See Treatise and Supplement, § 146.

Distinction between alteration and repair: See Treatise and Supplement, § 147.

Distinction between alteration and erection: See Treatise and Supplement, § 148.

See, generally, Treatise and Supplement, §§ 144, 145.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

See notes 30, 32, and 33, § 1183.

See Index, tit. "Alterations."

¹⁰ **Repaired:**

Distinction between alteration and repair: See Treatise, § 147.

See, generally, Treatise, §§ 144 and 145.

to such lien,¹¹ [except as provided in section eleven hundred and ninety-two of this code].¹² (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

§ 1186. The liens provided for in this chapter are preferred¹ to any lien, mortgage,² or other encumbrance which

Priorities between mechanics' liens and other estates, interests, or liens.

"General nature of labor for which a lien is given": See Treatise and Supplement, §§ 130-166.

See Notes 30, 31, and 32, § 1183, C. C. P.

11 Estates and interests subject to lien:

I. By contract:

Generally: See Treatise and Supplement, §§ 459-468.

General rule: See Treatise, § 461.

Fee or legal title subject: See Treatise and Supplement, § 462.

Same. Vendee being in possession: See Treatise and Supplement, § 463.

Same. Lessee being in possession: See Treatise and Supplement, § 464.

Same. Title held in trust: See Treatise and Supplement, § 465.

Interest of vendee in possession bound: See Treatise and Supplement, § 466.

Interest of vendee bound: See Treatise, § 467.

Homestead bound: See Treatise and Supplement, § 468.

See Index, tit. "Limitations of liens," tit. "Estates or interests," tit. "Homestead."

Estates and interests subject to lien:

II. By estoppel:

Generally: See Treatise and Supplement, §§ 469-485.

General rule as to when notice of non-responsibility must be given: See Treatise and Supplement, § 472.

Purpose of provision: See Treatise, § 474.

Notice or knowledge of improvement: See Treatise and Supplement, § 475.

Notice to corporation as owner: See Treatise, § 475.

Lessee in possession making improvements: See Treatise, § 477.

Vendee in possession making improvements: See Treatise, § 478.

When notice not required: See Treatise, § 479.

When notice not required in case of mines and mining claims: See Treatise and Supplement, § 480.

Notice in case of grading: See Treatise and Supplement, § 481.

In case of prior liens: See Treatise, § 482.

Effect of knowledge of claimant of lack of authority of person making improvement: See Treatise, § 483.

Notice, when to be posted: See Treatise and Supplement, § 484.

Notice, how posted: See Treatise, § 485.

See note 11 to § 1183, C. C. P., ante, and notes to § 1192, C. C. P., post.

12 Notice of non-responsibility:

See note 11, § 1185, C. C. P., ante; and see notes to § 1192, C. C. P., post.

§ 1186 C. C. P. 1 Priorities; generally: See Treatise and Supplement, §§ 486-507.

See notes to § 1188, C. C. P., post.

Priorities between mechanics' liens and other estates and interests, or other classes of liens: See Treatise and Supplement, §§ 487-503.

Priorities, between mechanics' liens and other estates, interests or liens.

may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished;³ also, to any lien, mortgage, or other encumbrance of which the lienholder had no notice,⁴ and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished. (Enacted March 11, 1872.)

Time within which claim of lien must be filed.⁵

§ 1187. Every original contractor,¹ [claiming the benefit of this chapter,] within [sixty days] after the completion of his [contract, and] every person save the original contractor claiming the benefit of this chapter, [within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract,³ if any, under

Statutory statement of rule: See Treatise, § 488.

General analysis of provision: See Treatise, § 489.

Grants and conveyances: See Treatise, § 490.

General rule as to priorities: See Treatise, § 495.

Priorities *inter sese*: See Treatise and Supplement, §§ 504-507.

See Index, tit. "Priorities," tit. "Mortgage."

² Mortgage:

Mortgage for purchase price: See Treatise, § 496.

Mortgage for future advances: See Treatise, § 497.

What constitutes further advances: See Treatise, § 499.

When lien claimants may attack prior encumbrances: See Treatise, § 500.

See Index, tit. "Priorities," tit. "Mortgage."

³ Doctrine of relation: See Treatise, § 491.

See Index, tit. "Relation."

⁴ See Treatise, § 490.

§ 1187 C. C. P. ¹ Contractor: Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Definition of original contractor: See Treatise and Supplement, § 45.

Tests or original contractor: See Treatise and Supplement, §§ 46-59.

Distinction between original contractor and material-man: See Treatise and Supplement, §§ 60, 77, 79 and 80.

General rights of original contractor: See Treatise and Supplement, §§ 61-63.

General obligations of original contractors: See Treatise and Supplement, §§ 64, 65.

See Index, tit. "Original contractor."

² Time of filing claim of lien: See, generally, Treatise and Supplement, §§ 422-437.

See Index, tit. "Claim of lien," tit. "Time."

³ Original contract:

Completion of contract; substantial and actual completion: See Treatise and Supplement, § 431.

which he was employed,] must file for record with the county recorder of the county or city and county ⁴ in which such property or some part thereof is situated a claim of lien ⁵ containing a statement of his demand after deducting all just credits and offsets, ⁶ with the name of the owner or reputed owner, ⁷ if known, also the name of the person by whom he was employed, ⁸ or to whom he furnished the materials, ⁹ with a statement of the ¹⁰ [price if any agreed upon for the same and when payable, ¹¹ and of the work agreed to be done and when the same was to be done, if agreed upon,] ¹² and also a description of the property to be charged with the lien, sufficient for identification, ¹³ which claim must

Place of filing.

Contents of claim.

Performance of contract: See Treatise and Supplement, §§ 334-347.
Statutory equivalents of completion for the purpose of filing claims of lien: See Treatise and Supplement, §§ 348-357.

Original contract; definition: See Treatise, § 211.

See Index, tit. "Performance," tit. "Performance of contract."

Place of filing claim of lien for record: See Treatise, § 420.

See Index, tit. "Claim of lien."

Claim of lien:

Nature, necessity, purpose: See Treatise and Supplement, §§ 361-367.

Contents, generally: See Treatise and Supplement, §§ 370-415.

See Index, tit. "Claim of lien."

Statement of demand after deducting all just credits and offsets: See Treatise and Supplement, §§ 375-378.

Object of provision: See Treatise and Supplement, § 376.

Demands against two or more buildings: See Treatise, § 378, and see § 1188, C. C. P., post, and notes.

See Index, tit. "Statement."

Name of owner or reputed owner: See Treatise and Supplement, §§ 380-386.

See Index, tit. "Claim of lien," tit. "Name of owner," tit. "Names required to be stated in claim of lien."

Name of employer: See Treatise, § 381.

Purchaser: See Treatise, § 381.

See Index, tit. "Claim of lien," tit. "Names required to be stated in claim of lien."

Statement of price: Compare "Terms, time given and conditions of contract": Treatise and Supplement, §§ 387-398.

"Price," "Value": See Treatise, § 456.

See Index, tit. "Claim of lien," tit. "Price."

¹¹ See "Terms, time given and conditions of contract," Treatise and Supplement, §§ 387-398.

¹² See "Terms, time given and conditions of contract," Treatise and Supplement, §§ 387-398.

Nature of labor: See Treatise and Supplement, §§ 130-165.

Description of property: See Treatise and Supplement, §§ 399-407.

Object of provision: See Treatise, § 401.

General rule: See Treatise, § 402.

Special applications; false calls: See Treatise and Supplement, § 403.

Verification of
claim.
What deemed
completion.

be verified by the oath of himself or of some other [person.¹⁴ Any] trivial imperfection¹⁵ in the said work, or in the [completion of any contract by any lien claimant, or in the] construction of any building, improvement or structure,¹⁶ or of the alteration, addition to, or repair thereof,¹⁷ shall not be

Property identified by name or exclusive character: See Treatise, § 404.

Description as including too much or too little: See Treatise, § 405.

Two or more descriptions: See Treatise, § 406. And see § 1183, C. C. P., post, and notes.

Application of provision as to demands against separate buildings: See Treatise, § 407. And see § 1189, C. C. P., post, and notes.

See Index, tit. "Description."

14 Verification: See Treatise and Supplement, § 410.

15 Trifling imperfection: See Treatise and Supplement, § 341.

Substantial performance: See Treatise and Supplement, §§ 342, 431.

General principles: See Treatise and Supplement, § 343.

Slight difference in value: See Treatise and Supplement, § 344.

Conveniences: See Treatise and Supplement, § 345.

Abandonment: See Treatise and Supplement, §§ 358-360.

Performance of contract, generally: See Treatise and Supplement, §§ 334-360.

16 Building, improvement or structure:

Building; variable use of term: See Treatise, § 170, note 9.

See, generally, Treatise and Supplement, §§ 174 and 175.

Ditch not a building: See Treatise, § 177.

Building as fixture: See Treatise, § 186.

See, generally, also, "Object on which labor must be performed," Treatise and Supplement, §§ 166-192.

Construction of contract with reference to: See Treatise, § 220.

See Index, tit. "Building."

Improvement: See § 1185, C. C. P., note 3, ante.

17 Alteration:

Character of alteration: See Treatise and Supplement, § 146.

Distinction between alteration and repair: See Treatise and Supplement, § 147.

Distinction between alteration and erection: See Treatise and Supplement, § 148.

See, generally, Treatise and Supplement, §§ 144, 145.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

See notes 30, 32, and 33, § 1183, C. C. P., ante.

See Index, tit. "Alterations."

Addition to: See Treatise and Supplement, § 144.

Construction of contracts as to "addition": See Treatise and Supplement, § 220.

See notes 30, 31, and 33, § 1183, C. C. P., ante.

Repair:

Distinction between alteration and repair: See Treatise, § 147.

See, generally, Treatise, §§ 144 and 145.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-166.

See notes 30, 31, and 32, § 1183, C. C. P., ante.

deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, **[any of the following shall be deemed equivalent to a completion for all the purposes of this chapter:]** the occupation or use of a building, improvement, or structure, by the owner, or his representative;¹⁸ or the acceptance by said owner or said agent, of said building, improvement, or structure,¹⁹ **[or]** cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair **[thereof];**²⁰ **the filing of the notice hereinafter provided for].**²¹

Equivalents of completion.

The **[owner may]** within ten days **[after completion]** of **[any contract]**²² or within forty days after cessation from labor **[thereon,]**²³ file for record in the office of the county recorder of the **[county where the property]** is situated,²⁴

Time of filing notice of completion or cessation from labor, by owner.

18 Occupation or use of building:

Statutory equivalents of completion, generally: See Treatise and Supplement, §§ 348-357.

Scope and object of provision: See Treatise, § 350.

Character of occupation or use: See Treatise, § 351.

Acceptance; waiver: See Treatise and Supplement, § 353.

19 Acceptance of building, improvement or structure: See preceding note.

20 Cessation from labor:

Statutory equivalents of completion, generally: See Treatise and Supplement, §§ 348-357.

Cessation from labor for thirty days: See Treatise and Supplement, § 354.

Scope of provision: See Treatise, § 355.

Character of cessation: See Treatise, § 356.

21 Notice of completion or cessation from labor, generally: See Treatise and Supplement, §§ 425-429.

Purpose and scope of provision: See Treatise, § 426.

Failure of owner to file notice: See Treatise and Supplement, § 427.

In case of structures: See Treatise, § 428.

General rule: See Treatise, § 429.

22 Completion of contract:

Building contracts, generally: See Treatise and Supplement, §§ 193-360.

Performance of contract: See Treatise and Supplement, §§ 334-347. See note 21 to § 1187, C. C. P., ante.

23 Cessation of labor, generally: See Treatise and Supplement, §§ 354-357. See note 21 to § 1187, C. C. P., ante.

24 Compare "Place of filing claim of lien": Treatise and Supplement, § 420.

Filing notice of completion or cessation: See Treatise and Supplement, §§ 425-429.

See note 21 to § 1187, C. C. P., ante.

Contents of
notice of
completion or
cessation.

Fee for recording.

Failure to file
notice, estoppel.

Claims against
two or more
properties.

a notice setting forth the date when [the same was completed,] or [on which] cessation from [labor occurred,²⁵ together with his name and the nature of his title, and] a description of the property sufficient for identification,²⁶ which notice shall be verified by [himself] or some other person on his behalf.²⁷ [The fee for recording the same shall be one dollar.] In case [such notice be not so filed] then the said owner and all persons deraigning title from or claiming [any interest through] him shall be estopped²⁸ in any proceedings [for the foreclosure of any lien provided] for in this chapter from maintaining any defense therein based on the ground that said [lien was not] filed within the time provided in this chapter;²⁹ [provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure,³⁰ or the alteration, addition or repair thereto].³¹ (In effect sixty days after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

§ 1188. In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements;¹ otherwise, the lien of such claim is postponed to other liens.²

²⁵ Notice of completion or cessation: See Treatise and Supplement, §§ 425-428.

See note 21 to § 1187, C. C. P., ante.

²⁶ Description of property sufficient for identification: See Treatise and Supplement, §§ 369-407.

See note 21 to § 1187, C. C. P., ante.

²⁷ Verification: See Treatise and Supplement, § 410.

²⁸ Estoppel: See Treatise and Supplement, §§ 469-471.

See note 21 to § 1187, C. C. P., ante.

See Index, tit. "Estoppel."

²⁹ Failure of owner to file notice: See Treatise and Supplement, § 427.

See note 21 to § 1187, C. C. P., ante.

³⁰ Building, improvement or structure:

See note 16, this section, ante.

³¹ See note 17, this section, ante.

§ 1188 C. C. P. 1 Buildings, mining claims or other improvements:

Object on which labor must be done; generally: See Treatise and Supplement, §§ 166-192.

² Claim against two or more buildings; generally: See Treatise and Supplement, § 502.

When provision applicable: See Treatise, § 503.

The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.³ (Enacted March 11, 1872.)

Priorities.

§ 1189. The recorder must record the claim in a book kept by him for that purpose,¹ which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.² (Enacted March 11, 1872.)

Recording claim.

Indexing.
Fees.

§ 1190. No lien provided for in this chapter binds any [property] for a longer period than ninety days after the same has been filed,¹ unless proceedings be commenced in a proper court within that time to enforce the same;² or, if a

Limitation on lien.

Time of commencing action to foreclose.

Claim against two or more buildings or mining claims: See Treatise and Supplement, §§ 378, 406.

Distinct objects on one parcel of land: See Treatise, § 448.

Necessity of one or more claims of lien: See Treatise, § 366.

Claim against several objects and pieces of property: See Treatise, § 368.

Priorities inter sese: See Treatise and Supplement, §§ 504-507.

³ See note 1, this section, ante.

Priorities, generally: See Treatise and Supplement, §§ 486-507.

§ 1189 C. C. P. ¹ **Recording claim of lien:** See Treatise and Supplement, § 365.

Purpose of filing claim within a certain time: See Treatise and Supplement, §§ 418, 419.

Place of filing claim for record: See Treatise, § 420.

Removal of claim from recorder's office: See Treatise, § 420.

Recorder's endorsement of filing prima facie evidence: See Treatise, § 795.

² **Indexing claim of lien:** See Index Supplement, tit. "Index."

§ 1190 C. C. P. ¹ **Time of commencing action to foreclose:** See Treatise and Supplement, §§ 649, 650.

General rule: See Treatise, § 649.

Amending complaint; doctrine of relation: See Treatise, § 649.

Debt must be payable: See Treatise, § 649.

Credit given: See Treatise, § 649.

Action to foreclose lien upon fund: See Treatise, § 650.

See Index, tit. "Time," tit. "Time, place and manner of commencing action to foreclose lien."

² **Place of commencing action to foreclose:** See Treatise and Supplement, §§ 651-655.

Generally: See Treatise and Supplement, § 651.

Jurisdiction of the Superior Court: See Treatise and Supplement, § 653.

Amount less than jurisdictional amount: See Treatise and Supplement, § 654.

Foreclosure in Federal Courts: See Treatise and Supplement, § 655.

Time of commencing action to foreclose.

Dismissal for want of prosecution.

Lien for grading, or improving lot, sidewalk or street.

credit be given, then ninety days after the expiration of such credit;³ but no lien continues in force for a longer time than [one year] from the time the work is completed, by any agreement to give credit, [and in case such proceedings be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution, and in all cases the dismissal of such action (unless it be expressly stated that the same is without prejudice) or a judgment rendered therein that no lien exists, shall be equivalent to the cancellation and removal from the record of such lien]. (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

§ 1191. Any person who, at the request of the reputed owner¹ of any lot in any incorporated city or town,² grades, fills in, or otherwise improves the same,³ or the street or sidewalk in front of or adjoining the same,⁴ or constructs any areas or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith⁵ has a lien upon said lot for his work done and materials

³ Giving credit: See Treatise, § 649.

⁴ Release of lien: See Treatise and Supplement, §§ 634-637.

Decree, generally: See Treatise and Supplement, §§ 903-934.

§ 1191 C. C. P. ¹ Request of reputed owner:

Owner and reputed owner: See Treatise, § 509.

Power of reputed owner; estoppel: See Treatise, § 34.

Lien imposed by merely reputed owner, unconstitutional: See Treatise, § 34.

See Index, tit. "Street work," tit. "Street improvement."

² Definition of "lot": See Treatise and Supplement, § 184, notes.

Object on which labor must be performed: See Treatise and Supplement, § 184.

³ Improve; meaning of term: See Treatise and Supplement, §§ 141, 142, 156, 158, and 437.

See note 5, this section.

⁴ Sidewalk: See Treatise and Supplement, § 184.

System of sewers: See Treatise, § 184.

Extent of lien on "lot": See Treatise, § 446.

⁵ Improvement in connection therewith:

Improvements: See Treatise, § 158.

"Therewith": See Treatise, § 159.

Work not under this section: See Treatise, § 157.

As to lien of material-man: See Treatise, § 97.

See note 3, this section.

furnished.⁶ (Amended March 15, 1887, Stats. & Amdts. 1886-7, p. 155.)

§ 1191a. Any health officer or governing board of any city, town or sanitary district, having served written notice upon the owner or reputed owner ¹ of real estate upon which there is a dwelling house, and such owner or reputed owner, after thirty days, having refused, neglected or failed to connect such dwelling house, together with all toilets, sinks and other plumbing therein, properly vented, and in a sanitary manner, with the adjoining street sewer, may construct the same at a reasonable cost, and the person doing said work at the request of such health officer or governing board, has a lien upon said real estate for his work done and materials furnished,² and such work done and materials furnished shall be held to have been done and furnished at the instance of such owner or reputed owner, or person claiming or having any interest therein. (In effect sixty days from and after April 19, 1909, Stats. 1909, chap. 653.)

Lien for connecting dwelling-house with sewer.

§ 1192. Every building or other improvement ¹ [or work] mentioned in [any of the preceding sections of this chapter]

⁶ Grading and other work under this section, generally: See Treatise and Supplement, §§ 139-142, §§ 156-160.

Extent of lien: See Treatise, § 446.

Relation to work on "structures": See Treatise, § 159.

§ 1191a C. C. P. ¹ Owner, generally: See Treatise and Supplement, §§ 508-571.

General rights of owner and employer: See Treatise and Supplement, §§ 510-522.

General obligations of owner: See Treatise, §§ 523-546.

Owner and reputed owner: See Treatise and Supplement, § 509.

Liability of owner upon statutory notice to withhold: See Treatise and Supplement, §§ 547-571.

See Index, tit. "Exhaustive," tit. "Owner," tit. "Owner, Employer or Person causing Improvement."

² Labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

Materials: Distinction between labor contract and contract for material: See Treatise and Supplement, §§ 59, 80, and 83.

Nature of materials, when lien allowed and when not: See, generally, Treatise and Supplement, §§ 87-91.

Package of material: See Treatise and Supplement, § 90.

Carriage charges: See Treatise and Supplement, § 91.

See Index, tit. "Materials," tit. "Material-man."

§ 1192 C. C. P. ¹ Building or improvement; variable use of terms: See Treatise § 170, note 9, §§ 141, 158, 171.

See generally Treatise and Supplement, §§ 174 and 175.

Ditch not a building: See Treatise, § 177.

Presumption as to agency for owner.

constructed, [altered or repaired] ² upon any land with the knowledge of the owner ³ or [of any] person having or claiming any [estate] therein, ⁴ and the work or [labor done or]

Building as fixture: See Treatise, § 186.

See generally also "Object on which labor must be performed," Treatise and Supplement, §§ 186-192.

Construction of contract, with reference to: See Treatise, § 220.

See Index, tit. "Building"; tit. "Improvement."

2 Construction: See, generally, Treatise and Supplement, §§ 144 and 145, and § 148.

Construction of mine: See Treatise and Supplement, § 150.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

Alteration: Character of alteration: See Treatise and Supplement, § 146.

Distinction between alteration and repair: See Treatise and Supplement, § 147.

Distinction between alteration and erection: See Treatise and Supplement, § 148.

See, generally, Treatise and Supplement, §§ 144, 145.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

See notes 30, 32 and 33, § 1183.

See Index, tit. "Alterations"; tit. "Construction, alteration and repair."

Repair: Distinction between alteration and repair: See Treatise § 147.

See, generally, Treatise, §§ 144 and 145.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-166.

See notes 30, 31 and 32, § 1183, C. C. P.

Owner: See generally, Treatise and Supplement, §§ 508-571.

General rights of owner and employer: See Treatise and Supplement, §§ 510-522.

General obligations of owner: See Treatise, §§ 523-546.

Owner and reputed owner: See Treatise and Supplement, § 509.

Liability of owner upon statutory notice to withhold: See Treatise and Supplement, §§ 547-571.

See Index, tit. "Owner"; tit. "Owner, Employer or Person causing improvement."

4 Estates and interests subject to lien:

I. By Contract:

Generally: See Treatise and Supplement, §§ 459-468.

General rule: See Treatise, § 461.

Fee or legal title subject: See Treatise and Supplement, § 462.

Same. Vendee being in possession: See Treatise and Supplement, § 463.

Same. Lessee being in possession: See Treatise and Supplement, § 464.

Same. Title held in trust: See Treatise and Supplement, § 465.

Interest of vendee bound: See Treatise and Supplement, § 466.

Interest of vendee bound: See Treatise, § 467.

Homestead bound: See Treatise and Supplement, § 468.

materials furnished mentioned in [any of] said [sections 5 with] the knowledge of the owner or persons having or claiming any [estate in the land,] shall be held to have been constructed, performed or furnished at the instance of such owner or person having or claiming any [estate] therein, and [such] interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter,⁶ unless such owner or person having or claiming any [estate] therein shall, within ten days after he shall have obtained

Presumption as to agency for owner.

Duty of owner to post and record notice of non-responsibility on obtaining knowledge of work.

See Index, tit. "Limitations of liens," tit. "Estates or interests," tit. "Homestead."

Estates and interests subject to lien:

II. By Estoppel:

Generally: See Treatise and Supplement, §§ 469-485.

General rule as to when notice of non-responsibility must be given: See Treatise and Supplement, § 472.

Purpose of provision: See Treatise, § 474.

Notice or knowledge of improvement: See Treatise and Supplement, § 475.

Notice to corporation as owner: See Treatise, § 475.

Lessee in possession making improvements: See Treatise, § 477.

Vendee in possession making improvements: See Treatise, § 478.

When notice not required: See Treatise, § 479.

When notice not required in case of mines and mining claims: See Treatise and Supplement, § 480.

Notice in case of grading: See Treatise and Supplement, § 481.

In case of prior liens: See Treatise, § 482.

Effect of knowledge of claimant of lack of authority of person making improvement: See Treatise, § 483.

Notice, when to be posted: See Treatise and Supplement, § 484.

Notice, how posted: See Treatise, § 485.

See note 11 to §§ 1183, C. C. P., ante.

Labor for which a lien is given; generally: See Treatise and Supplement, §§ 166-192.

Materials: Distinction between labor contract and contract for material: See Treatise and Supplement, §§ 59, 80 and 83.

Nature of materials, when lien allowed and when not: See, generally, Treatise and Supplement, §§ 87-91.

Package of material: See Treatise and Supplement, § 90.

Carriage charges: See Treatise and Supplement, § 91.

See Index, tit. "Materials," tit. "Material-man."

Use of materials; contract for use of materials: See Treatise and Supplement, § 82.

General essentials: See Treatise and Supplement, § 86.

Nature and manner of use of materials: See Treatise and Supplement, § 87.

Materials, how used: See Treatise and Supplement, § 89.

See Index, tit. "Materials," tit. "Material-man," and tit. "Use of materials."

⁶ See note 4, this section, ante.

Notice of non-responsibility.

knowledge of such construction, alteration or repair⁷ or work or labor, give notice that he will not be responsible for the same⁸ by posting a notice in writing to that effect in some conspicuous place upon the [property,⁹ and shall also, within the same period, file for record a verified]¹⁰ copy of [said] notice in the office of the county recorder of the [said county in which said property or some part thereof is situated]. [Said notice shall contain a description of the property affected thereby sufficient for identification,¹¹ with the name,¹² and the nature of the title or interest of the person giving the same, said copy so recorded may be verified by anyone having a knowledge of the facts, on behalf of the owner or person for whose protection the notice is given.] (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

Contents of notice.

Verification.

Recovery on contractor's lien.

§ 1193. [Any] contractor¹ shall be entitled to recover, upon a lien filed by him, only such amount as may be due to him according to the terms of his contract,² after deducting

⁷ See note 2, this section, ante.

⁸ See note 4, this section, ante.

⁹ Property; distinguished from object of labor: See Treatise and Supplement, §§ 166, 167.

Description of property in claim: See Treatise and Supplement, §§ 399-407.

Territorial extent of lien: See Treatise and Supplement, §§ 438-451.

Estates and interests subject to lien: See Treatise and Supplement, §§ 459-485.

See Index, tit. "Property," tit. "Description of property to be charged."

¹⁰ Verification: See Treatise and Supplement, § 410.

¹¹ Description of property: See Treatise and Supplement, §§ 399-407.

¹² Names in claim: Compare Treatise and Supplement, §§ 379-386.

§ 1193 C. C. P. 1 Contractor: Constitutional and legislative classifications: See Treatise and Supplement, §§ 28 and 42.

Definition of original contractor: See Treatise and Supplement, § 45.

Tests of original contractor: See Treatise and Supplement, §§ 46-59.

Distinction between original contractor and material-man: See Treatise and Supplement, §§ 60, 77, 79 and 80.

General rights of original contractor: See Treatise and Supplement, §§ 61-63.

General obligations of original contractors: See Treatise and Supplement, §§ 64, 65.

See Index, tit. "Original contractor."

2 Original contract: definition of original contract: See Treatise, § 211, and see § 194.

General principles applicable to building contracts: See Treatise and Supplement, §§ 193-215.

all claims of other parties for work done and materials furnished, as aforesaid, [and embraced within his contract;] and in all cases where a lien shall be filed under this [act] for work done or for materials furnished ³ to any contractor, he shall defend any action brought thereon at his own expense;⁴ and during the pendency of such action, the owner may withhold from the contractor the amount of money for which such lien is filed;⁵ and in case of judgment ⁶ against the owner or his property upon the lien, the said owner shall be entitled to deduct from any amount due, or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if

Contractor to defend against liens.

Owner may withhold amount of claims, and deduct judgments.

Construction of building contract: See Treatise and Supplement, §§ 216-228.

Common clauses peculiar to building contracts: See §§ 229-257.

Non-statutory original contract: See Treatise and Supplement, §§ 258-268.

Statutory original contract:

Statutory requirements not essential to the validity of the whole statutory original contract: See Treatise and Supplement, §§ 269-285.

Statutory requirements essential to the validity of statutory original contracts: See Treatise and Supplement, §§ 286-314.

Effect of validity or invalidity of statutory original contract (indirect or direct lien): See Treatise and Supplement, §§ 315-325.

Extinction of original contract: See Treatise and Supplement, §§ 326-360.

³ Labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

Materials:

Distinction between labor contract and contract for material: See Treatise and Supplement, §§ 59, 80 and 83.

Nature of materials, when lien allowed and when not: See generally Treatise and Supplement, §§ 87-91.

Package of material: See Treatise and Supplement, § 90.

Carriage charges: See Treatise and Supplement, § 91.

See Index, tit. "Materials," tit. "Material-man."

Use of materials, or Contract for use of materials: See Treatise and Supplement, § 82.

General essentials: See Treatise and Supplement, § 86.

Nature and manner of use of materials: See Treatise and Supplement, § 87.

Materials, how used: See Treatise and Supplement, § 89.

See Index, tit. "Materials," tit. "Material-man," and tit. "Use of materials."

⁴ General obligations of original contractor: See Treatise and Supplement, §§ 64, 65.

⁵ See preceding note.

⁶ Judgment: See Treatise and Supplement, §§ 903-934.

Recovery of excess from contractor, and sureties.

Acts of owner not prevention of performance, or to exonerate sureties.

Docketing judgment for deficiency.

the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor;⁷ [or his bondsmen or sureties on any bond given for the faithful performance of his contract,]⁸ any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable. [No act done by such owner in compliance with any of the provisions of this chapter shall be held to be a prevention of the performance⁹ of any such contract by the contractor, or to have exonerated the sureties on such or any bond given for faithful performance,¹⁰ or for the payment of liens of persons performing labor or furnishing materials, or both; provided that such act was done in good faith and without design to injure or harrass any one.] (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

§ 1194. [Whenever on the sale¹ of the property² sub-
ject to any of the liens provided for in this chapter, under the judgment or decree³ of foreclosure of such lien, there is a deficiency⁴ of proceeds, judgment for the deficiency may be docketed against the party personally liable⁵ therefore in like manner and with like effect as in action for the foreclosure of mortgages.] (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

⁷ General rights of owner against contractor: See Treatise and Supplement, §§ 511-520; and § 64.

⁸ Bond; sureties, generally: See Treatise and Supplement, §§ 605-626. Contractor's bond: See Treatise and Supplement, §§ 281-285.

See Index, tit. "Bond," tit. "Bond of contractor."

⁹ Prevention of performance: See Treatise, §§ 360, 387.

Performance, generally: See Treatise and Supplement, §§ 334-347.

¹⁰ "Sureties," generally: See Treatise and Supplement, §§ 605-626.

§ 1194 C. C. P. ¹ Sale and redemption: See Treatise and Supplement, §§ 948-955.

² Property; distinguished from object of labor: See Treatise and Supplement, §§ 166, 167.

Description of property in claim: See Treatise and Supplement, §§ 399-407.

Territorial extent of lien: See Treatise and Supplement, §§ 438-451.

Estates and interests subject to lien: See Treatise and Supplement, §§ 459-485.

See Index, tit. "Property," tit. "Description of property to be charged."

³ Decree: See Treatise and Supplement, §§ 903-934.

⁴ Deficiency judgment: See Treatise and Supplement, §§ 922-925.

⁵ Party personally liable: See Treatise and Supplement, §§ 914-921.

§ 1195. Any number of persons claiming liens may join in the same action¹ and when separate actions are commenced, the court may consolidate them.² The court must also allow, as a part of the costs,³ the money paid for [verifying] and recording the [lien, such costs] to be allowed to [each claimant] whose lien is established, whether he be plaintiff or defendant, or whether they all join in one action or separate actions are consolidated. (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.).

Joinder of plaintiffs.

Consolidation of actions.

Costs.

§ 1196. Whenever materials¹ shall have been furnished for use in the construction, alteration, or repair² of any

Process against materials.

§ 1195 C. C. P. 1 Joinder of parties plaintiff: See Treatise and Supplement, §§ 659-661.

2 Consolidation of actions: See Treatise and Supplement, § 869.

3 Costs: See Treatise and Supplement, §§ 935-947.

§ 1196 C. C. P. 1 Materials:

Distinction between labor contract and contract for material: See Treatise and Supplement, §§ 59, 80 and 83.

Nature of materials, when lien allowed and when not: See, generally, Treatise and Supplement, §§ 87-91.

Package of material: See Treatise and Supplement, § 90.

Carriage charges: See Treatise and Supplement, § 91.

See Index, tit. "Materials," tit. "Material-man."

Use of materials:

Contract for use of materials: See Treatise and Supplement, § 82.

General essentials: See Treatise and Supplement, § 86.

Nature and manner of use of materials: See Treatise and Supplement, § 87.

Materials, how used: See Treatise and Supplement, § 89.

See Index, tit. "Materials," tit. "Material-man," and tit. "Use of materials."

2 Construction: See, generally Treatise and Supplement, §§ 144 and 145, and § 148.

Construction of mine: See Treatise and Supplement, § 150.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

Alteration; character of alteration: See Treatise and Supplement, § 146.

Distinction between alteration and repair: See Treatise and Supplement, § 147.

Distinction between alteration and erection: See Treatise and Supplement, § 148.

See, generally, Treatise and Supplement, §§ 144, 145.

General nature of labor for which a lien is given: See Treatise and Supplement, §§ 130-165.

See notes 30, 32 and 33, § 1183.

See Index, tit. "Alterations."

Repair: Distinction between alteration and repair: See Treatise, § 147.

Process against materials.

building³ or other improvement, such materials shall not be subject to attachment, execution or other legal process,¹ to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim,⁵ or other improvement. (Amended March 30, 1874, Code Amdts. 1873-4, p. 412.)

Personal action preserved.

Attachment.

Personal judgment not to affect lien.

§ 1197. Nothing contained in this chapter shall be construed to impair or [effect] [affect] the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action¹ to recover [said] debt against the person liable therefor; [and the person bringing such personal action may take out an attachment² therefor, notwithstanding his lien, and in his affidavit to procure an attachment need not state that his demand is not secured by a lien; but the judgment,³ if any, obtained by the plaintiff in such personal action shall not be construed to impair or merge any lien held by said plaintiff under this chapter;⁴ provided, only, that any money collected on said judgment shall be credited on the amount of such lien in any action brought to enforce the same, in accordance with the

See, generally, Treatise, §§ 144 and 145.

See General nature of labor for which a lien is given: Treatise and Supplement, §§ 130-166.

See notes 30, 31, and 32, § 1183, C. C. P.

³ Building or other improvement: See note 1 to § 1192, C. C. P., ante. See Index, tit. "Building," tit. "Improvement."

⁴ Provisional Remedies: See Treatise and Supplement, §§ 645-648.

Attachment: See Treatise and Supplement, §§ 646, 647.

Execution: See Treatise, §§ 949-953.

⁵ Mines and mining claims; Second Clause:

Definition of mine: See Treatise and Supplement, § 183.

Labor for which a lien is given in mines: See Treatise and Supplement, §§ 132-137; §§ 149-155, § 165.

Object on which the labor must be performed in mines: See Treatise and Supplement, §§ 182, 183.

Work on fixtures in mines: See Treatise and Supplement, § 191.

See Index, tit. "Mines and mining claims."

§ 1197 C. C. P. 1 Personal action: See Treatise and Supplement, §§ 638-644.

2 Attachment: See Treatise and Supplement, §§ 646, 647.

3 Judgment, generally: See Treatise and Supplement, §§ 903-934.

4 Waiver, forfeiture and release of lien: See Treatise and Supplement, §§ 627-637.

provisions of this chapter]. (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

§ 1198. Except as otherwise provided in this chapter, the provisions of part two of this code are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter.¹ (Enacted March 11, 1872.)

Rules of
practice.

§ 1199. The provisions of part two of this code relative to new trials¹ and appeals,² except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter, (Enacted March 11, 1872.)

New trials
and appeals.

§ 1200, of the Code of Civil Procedure, was repealed. (Stats. & Amdts. 1911, pp. 1313 et seq. In effect sixty days from and after May 1, 1911.)

§ 1200a was in terms repealed by Stats. & Amdts. 1911, pp. 1313 et seq., but there was no such section, and it is not mentioned in the title of the act. (In effect sixty days from and after May 1, 1911.)

§ 1201. It shall not be competent for the owner¹ and contractor,² or either of them, by any term of their contract,³

Waiving and
impairing liens.

§ 1198 C. C. P. ¹ **Trial and practice:** See Treatise and Supplement, §§ 864-884.

§ 1199 C. C. P. ¹ **New trial:** See Treatise and Supplement, § 877.

² **Appeal:** See Treatise and Supplement, §§ 956-991.

§ 1201 C. C. P. ¹ **Owner:** See, generally, Treatise and Supplement, §§ 508-571.

General rights of owner and employer: See Treatise and Supplement, §§ 510-522.

General obligations of owner: See Treatise, §§ 523-546.

Owner and reputed owner: See Treatise and Supplement, § 509.

Liability of owner upon statutory notice to withhold: See Treatise and Supplement, §§ 547-571.

See Index, tit. "Exhaustive," tit. "Owner," tit. "Owner, Employer or person causing improvement."

² **Contractor: Constitutional and legislative classifications:** See Treatise and Supplement, §§ 28 and 42.

Definition of original contractor: See Treatise and Supplement, § 45.

Tests of original contractor: See Treatise and Supplement, §§ 46-59.

Distinction between original contractor and material-man: See Treatise and Supplement, §§ 60, 77, 79 and 80.

General rights of original contractor: See Treatise and Supplement, §§ 61-63.

General obligations of original contractors: See Treatise and Supplement, §§ 64, 65.

See Index, tit. "Original contractor."

³ **Original contract: Definition of original contract:** See Treatise, § 211, and see § 194.

**Waiving and
impairing liens.**

or otherwise, to waive, affect, or impair⁴ the claims and liens of other persons whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void. (Enacted March 18, 1885. Stats. & Amdts. 1884-5, p. 146.)

**Forfeiture
of lien.**

§ 1202. Any person who shall wilfully give a false notice of his claim¹ to the owner under the provisions of section one thousand one hundred and eighty-four shall forfeit² his lien. Any person who shall wilfully include in his claim filed under section one thousand one hundred and eighty-seven work or materials not performed upon or furnished for the property described in the claims shall forfeit his lien.³ (In effect sixty days from and after May 1, 1911. Stats. & Amdts. 1911, pp. 1313 et seq.)

**Mistakes or
errors not to
avoid lien,
except for fraud.**

§ 1203. No [mistake] or errors¹ in the statement of the demand,² or of the amount of credits³ and offsetts⁴ allowed [,] or of the balance asserted to be due to claimant.⁵

General principles applicable to building contracts: See Treatise and Supplement, §§ 193-215.

Construction of building contract: See Treatise and Supplement, §§ 216-228.

Common clauses peculiar to building contracts: See §§ 229-257.

Non-statutory original contract: See Treatise and Supplement, §§ 258-268.

Statutory original contract:

Statutory requirements not essential to the validity of the whole statutory original contract: See Treatise and Supplement, §§ 269-285.

Statutory requirements essential to the validity of statutory original contracts: See Treatise and Supplement, §§ 286-314.

Effect of validity or invalidity of statutory original contract (Indirect or direct lien): See Treatise and Supplement, §§ 315-325.

Extinction of original contract: See Treatise and Supplement, §§ 326-360.

4 Waiver, Forfeiture and Release of Lien: See Treatise and Supplement, §§ 627-637.

§ 1202 C. C. P. 1 False claim: See Treatise and Supplement, §§ 632, 633.

Mistake or error in claim: See Treatise and Supplement, §§ 412-414.

2 Forfeiture of Lien: See Treatise and Supplement, §§ 632, 633.

3 See notes 1 and 2, this section, ante.

See § 1203a, note, post.

§ 1203 C. C. P. 1 Mistake and error in claim: See Treatise and Supplement, § 412.

2 Statement of demand: See Treatise and Supplement, §§ 375-378.

3 Credits: See Treatise and Supplement, §§ 398 and 847.

4 Offsets: See Treatise and Supplement, §§ 515-517, § 753.

5 Claimants: See notes 4-20, § 1183, C. C. P., ante.

nor in the description of the property ⁶ against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the court shall find that [an] innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property lienied upon, and that the notice of claim was so deficient that it did not put the party upon further [injury] in any manner. (In effect sixty days from and after May 1, 1911, Stats. & Amdts. 1911, pp. 1313 et seq.)

Mistakes and errors.

Bona fide purchasers.

§ 1203a.¹ No mistakes or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the lien is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the court shall find that the innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide purchaser of the property lienied upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner. (Enacted March 22, 1907, Stats. & Amdts. 1907, p. 858.)

Mistakes and errors.

⁶ **Property: Distinguished from object of labor:** See Treatise and Supplement, §§ 166, 167.

Description of property in claim: See Treatise and Supplement, §§ 399-407.

Territorial extent of lien: See Treatise and Supplement, §§ 438-451.

Estates and interests subject to lien: See Treatise and Supplement, §§ 469-485.

See Index, tit. "Property," tit. "Description of property to be charged."

§ 1203a C. C. P. ¹ This section is identical with § 1203, ante, as amended by Stats. & Amdts. 1911, pp. 1313 et seq., with the exception of a few words noted in black type in that section.

The title of Chapter 681 (Stats. & Amdts. 1911) is "An act to amend Sections 1183, 1184, 1185, 1187, 1190, 1192, 1193, 1194, 1195, 1197, 1202 and 1203, of the Code of Civil Procedure of the State of California and to repeal Sections 1183a, 1200 and 1203a of said code, all relating to the liens of mechanics and others." But nowhere in the act itself is there any provision for the repeal of this section. Section 13 of the act provides for the repeal of § 1200a. There was no such section.

Sec. 14. (Act approved May 1, 1911, Stats. and Amdts. 1911, pp. 1313 et seq.)

Liberal construction of act.

The provisions of this act shall be liberally construed with a view to effect its purpose.¹ They are not intended as a reenactment of the provisions of former statutes, with the policy heretofore impressed upon the same by the courts of this state, but are intended to reverse that policy to the extent of making the liens provided for direct,² and independent of any account of indebtedness between the owner and contractor, thereby making the policy of this state conform to that of Nevada and the other Pacific coast states.³ (In effect sixty days from and after May 1, 1911.)

Intention of act.
Direct lien.

Policy of state.

¹ **Construction of Mechanics' Lien statutes:** See Treatise and Supplement, §§ 24-27.

² **Direct and indirect lien:** See Treatise and Supplement, §§ 10 and 11, and note 2, § 1201, C. C. P., ante.

³ **Kinship between statutes of different states:** See Treatise and Supplement, § 18.

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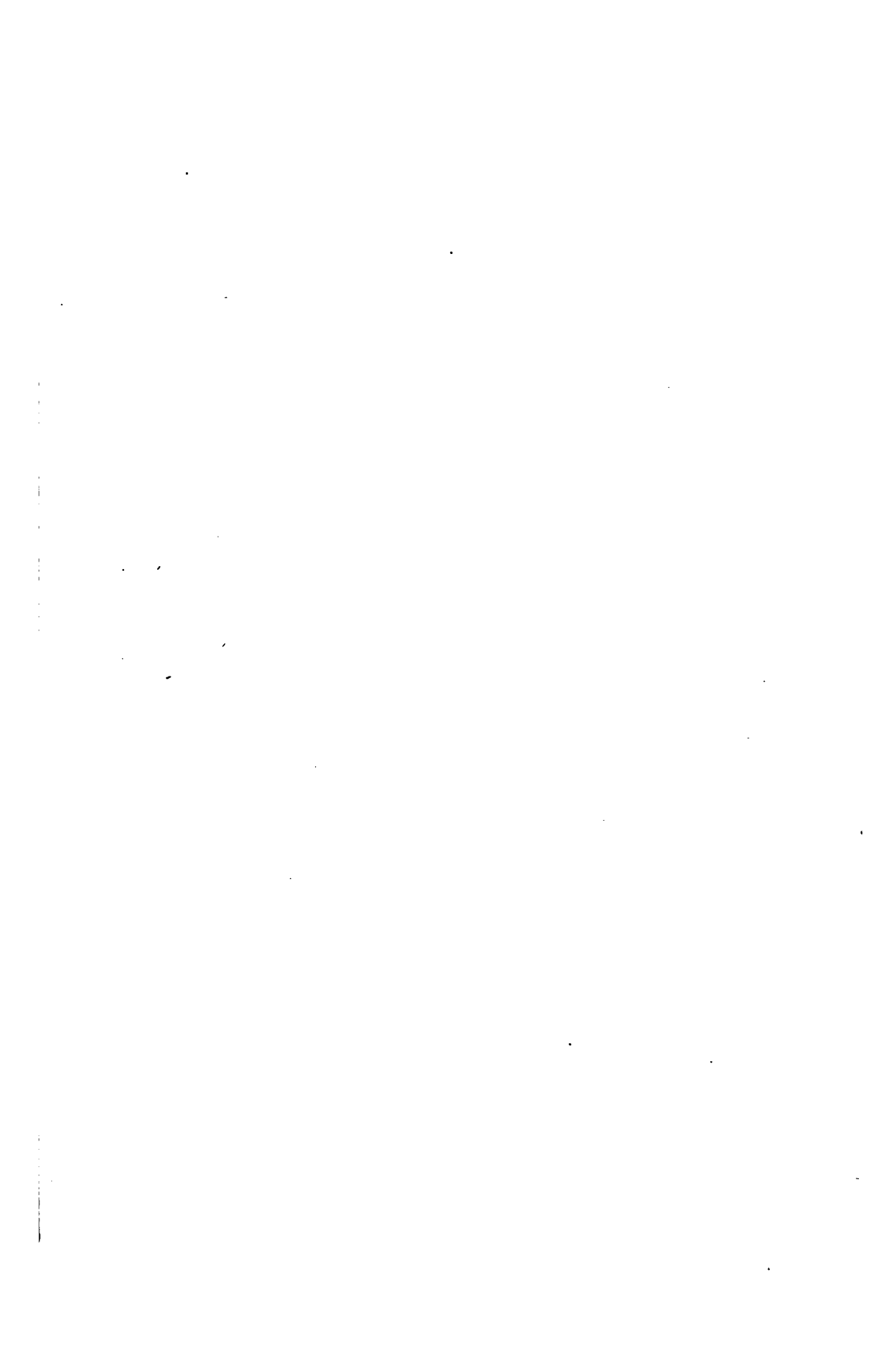
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